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In The Supreme Court Of The United States

OCTOBER TERM 1996

A. GUY CROUCH, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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FIRST QUESTION PRESENTED

Whether an accused, who is claiming a due process violation as a result of pre-indictment delay, must prove, in addition to prejudice, that the government intentionally delayed the indictment for a tactical advantage or other bad-faith purpose.

SECOND QUESTION PRESENTED

Whether a trial court commits clear error in finding prejudice resulting from pre-indictment delay and in dismissing an indictment before trial, rather than waiting until after trial.

THIRD QUESTION PRESENTED

Whether presumed prejudice, combined with actual prejudice, shifts the burden to the government to justify pre-indictment delay.

PARTIES TO THE PROCEEDINGS

The following are the names of all of the parties; A. Guy Crouch III, the United States of America, and Michael J. Frye (co-defendant.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

A. GUY CROUCH, III, *Petitioner*,

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UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The petitioner, A. Guy Crouch, III, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, issued May 30, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996), is reprinted as Appendix A.

The panel opinion of that court, *United States v. Crouch*, 51 F.3d 480 (5th Cir. 1995), is reprinted as Appendix B.

The opinion of the United States District Court, *United States v. Crouch*, 835 F.Supp. 938 (S.D. Tex. 1993), is reprinted as Appendix C.

The report and recommendation of the Magistrate Judge (*Report*), which is unpublished, is reprinted as Appendix D.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit, in a rehearing *en banc*, reversed a panel decision of that court and reversed the district court on May 30, 1996. 28 U.S.C. §1254(1) gives this Court jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows: "No person shall be ... deprived of life, liberty, or property, without due process of law ...."

STATEMENT OF THE CASE

A. The Pre-Indictment Delay

Crouch was indicted on 19 counts of alleged federal savings and loan offenses. The indictment charges false

entries, 18 U.S.C. §1006; false statements, 18 U.S.C. §1014; misapplication of funds, 18 U.S.C. §657; bank fraud, 18 U.S.C. §1344; and conspiracy under 18 U.S.C. §3711 to commit those offenses. The indictment concerns loans made by Delta Savings Association (Delta) on June 28, 1985. Crouch was Chairman of the Board of Delta and a member of the loan committee, from early 1985 until September 1986. He also was Delta's attorney and half owner, with his father, of the title company at which the loans closed. *Crouch*, 84 F.3d at 3855; Appendix A7-A9.

The offenses allegedly occurred in 1984 and 1985. At the time of the alleged offenses, a five-year statute of limitations applied, but Congress doubled the limitations period in 1989, **after the offenses allegedly were committed**. But for the extension of the limitations period, this prosecution would have been barred in 1990. *Report*, at 2 n. 1; Appendix D2. The indictment was issued on November 12, 1992, within the extended ten-year time period.

In 1986, Delta was placed under government control. The report of the bank examiner concluded that "material violations" of banking regulations had occurred, and in August 1986 the examiner sent "criminal referrals"[1] to the FBI and the United States Attorney regarding Delta. The referrals implicated Crouch. Starting with the 1986 criminal referrals, the FBI worked on the matter off and on, but not on

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[1] According to the testimony of the FBI special agent in charge, a criminal referral is "generally a summary of an event or a transaction that the examiner feels that needs to be looked into as far as possible criminal involvement or needs some work for a criminal investigation." *Crouch*, 84 F.3d at 3859; Appendix A15-A17.

a concentrated basis until 1991. *Crouch*, 84 F.3d at 3858-59; Appendix A13-A17.

In 1986, the bank examiner told Crouch that he did not have any problems with Crouch concerning the transactions in question. In 1989, an Assistant United States Attorney told Crouch that he was not the subject of an investigation. In 1990 and 1991, the FBI agent on the case gave Crouch the same assurances. *Crouch*, 84 F.3d at 3860; Appendix A17-A19. The district court found that Crouch's reliance on those assurances caused Crouch not to make preparations to defend himself until 1992. The district court found "incredible" the assertion of the Assistant United States Attorney that Crouch was not a target until 1992. *Crouch*, 835 F.Supp. at 943; Appendix C11-C13. By the time Crouch realized that he was the target of the government's investigation, he had met and freely cooperated with the FBI, delivered the originals of pertinent documents without retaining copies, and agreed to testify for the government in the prosecution of Carl Gerjes, a past President of Delta. *Report* at 2; Appendix D2.

B. Proceedings Below

In support of his motion to dismiss on grounds of pre-indictment delay, Crouch testified before the Magistrate Judge that his defense was prejudiced by lost documents and the deaths of six witnesses, including his father, an original founder and major stockholder of Delta. *Report* at 4; Appendix D3-D4. Crouch's father had testified for the government in the successful prosecution of Gerjes. *Crouch*, 84 F.3d at 3859; Appendix A15-A17. Gerjes would be a key witness in the prosecution of Crouch. *Id.* at 3877-78, Appendix A52-A56; *Report* at 4; Appendix D3-4.

Crouch also adduced expert testimony on memory loss. He testified to his own difficulty in remembering details of the transactions in question. The testimony of the FBI agent on the case demonstrated his own inability to remember details of the investigation. *Crouch*, 835 F.Supp. at 945-46; Appendix C16-C20.

On the recommendation of the Magistrate Judge, the District Court found that the length of delay, the death of the witnesses, the lost documents, and the memory loss supported a finding of actual and presumed prejudice. *Crouch*, 835 F.Supp. at 943-45; Appendix C11-C18. The District Court further found that the government's reasons for the delay in indictment - lack of sufficient resources - did not outweigh the prejudice. *Crouch*, 835 F. Supp. at 945-46; Appendix C16-C20. Citing the government for negligence, the District Court expressly reserved the question of whether the government had delayed the indictment in bad faith to gain a tactical advantage. The District Court observed that, because the Magistrate Judge had quashed subpoenas for government files, "where further evidence of bad faith might be located," bad faith "cannot be ruled out," and "[f]urther inquiry might have revealed this to be the tip of the 'bad faith' iceberg." *Crouch*, 835 F. Supp. at 943 n. 6; Appendix C13. Using the balancing test instead of the bad-faith test, the District Court dismissed the indictment on due process grounds. *Crouch*, 835 F.Supp. at 945-46; Appendix C16-C20. The government appealed.

A divided panel of the United States Court of Appeals for the Fifth Circuit upheld the finding of actual prejudice and the dismissal of the indictment under the balancing test. *Crouch*, 51 F.3d at 3536; Appendix B12-B13. The panel rejected the district court's finding of presumed prejudice. *Crouch*, 51 F.3d at 3534-35; Appendix B7-B11.

On rehearing *en banc*, the divided Court of Appeals rejected the balancing test and required a showing that the government intentionally delayed indictment for a tactical advantage or for some other bad faith purpose. *Crouch*, 84 F.3d at 3882; Appendix A63-A65. The Court of Appeals also rejected the district court's reliance on presumed prejudice. *Crouch*, 84 F.3d at 3872; Appendix A42-A44. The Court of Appeals further held that the district court had committed clear error in finding actual prejudice before trial, instead of waiting until after trial. *Crouch*, 84 F.3d at 3883; Appendix A65-A67.

REASONS FOR GRANTING THE PETITION AS TO THE FIRST QUESTION PRESENTED

The United States Court of Appeals for the Fifth Circuit has has rendered a decision in conflict with decisions of other United States courts of appeals and in conflict with state courts of last resort over whether an accused, who is claiming a due process violation as a result of pre-indictment delay, must prove, in addition to prejudice, that the government delayed indictment for a tactical advantage or other bad-faith purpose. The standard set by the Court of Appeals is erroneous. The issue presents an important question of federal law which has not been, but should be, decided by this Court.

I. The Court of Appeals Interpretation of the Due Process Clause in the Pre-Indictment Delay Context Conflicts with Four Circuits and with State Courts of Last Resort

The decision of the Court of Appeals conflicts with panel decisions of the four United States courts of appeals that consistently employ a balancing test. *See, e.g., Howell v. Barker*, 904 F.2d 889, 895 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990); *United States v. Canoy*, 38 F.3d 893, 901-02 (7th Cir. 1994); *United States v. Savage*, 863 F.2d 595, 598 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989); *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986). Under that approach, "once the defendant has proven actual and substantial prejudice, the governmment must come forward and provide its reasons for the delay. The reasons are then balanced against the defendant's prejudice to determine whether the defendant has been denied due process." *Canoy*, 38 F.3d at 902.

Panel decisions of the other federal circuits largely employ some form of the bad-faith intentional-delay test. *See, e.g., Crouch*, 84 F.3d at 3868-69; Appendix A33-A37 (surveying jurisdictions). Under one version of the bad-faith intentional-delay test, the defendant must show prejudice and that the government intentionally delayed the indictment in order to gain a tactical advantage in that case. Other versions of the test consider not only "tactical advantage" delay but also delay for "improper motive," *United States v. Morelli*, 643 F.2d 402, 413 (6th Cir.), *cert. denied*, 453 U.S. 912 (1981), or "other bad faith purpose." *Crouch*, 84 F.3d at 3869; Appendix A35-A37.

The decision of the Court of Appeals also conflicts with decisions of state courts of last resort. *See, e.g., State v. Schrader*, 518 So.2d 1024, 1028 (La. 1988), *cert. denied*, 498 U.S. 903 (1990) (balancing test). The decisions of several other state supreme courts conflict with the standards employed by panels of the federal circuits in which they lie. *Compare State v. Gray*, 917 S.W.2d 668,

673 (Tenn. 1996) (three-factor analysis) *with United States v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992) (bad-faith test); *and State v. Gonzales*, 805 P.2d 630, 631 (N.M. 1991) (bad-faith test) *with United States v. Comosona*, 614 F.2d 695, 697 (10th Cir. 1980) (balancing test); *and Scott v. State*, 581 So.2d 887, 891 (Fla. 1991) (balancing test) *with United States v. Hayes*, 40 F.3d 362, 365 (11th Cir. 1994) (bad-faith test).

In 1988, Justice White noted the conflict among the federal circuits as to the standard to be applied to due process claims stemming from pre-indictment delay, with some applying a balancing test and others a bad-faith intentional delay test. *Hoo v. United States*, 484 U.S. 1035, 1036 (1988) (White, J., opinion dissenting from denial of certiorari). Justice White also noted that the Fifth and Seventh Circuits were divided internally. *Id.* Justice White concluded that "[t]he continuing conflict among the Circuits on this important question of constitutional law requires resolution by this Court." *Id.* Since Justice White's opinion in *Hoo*, the Seventh Circuit has resolved its internal division in favor of a balancing test. *United States v. Canoy*, 38 F.3d 893, 901-02 (7th Cir. 1994).[2]

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[2] In *Sowa*, the Seventh Circuit seemed to combine the balancing and bad-faith tests. *United States v. Sowa*, 34 F.3d at 447, 451 (7th Cir. 1994) ("[t]he reasons are then balanced against the defendant's prejudice"). The Seventh Circuit later clarified its position in *Canoy* by noting its two competing lines of cases and by characterizing the *Sowa* decision as adopting the balancing test. The *Canoy* opinion has the precedential effect of an *en banc* opinion, because it was circulated to the full court, and no member objected to the opinion. *Canoy*, 38 F.3d at 906 n. 12; *National Cycle, Inc.*

With the decision below in the present case, the Fifth Circuit has resolved its internal division in favor of a bad-faith intentional delay test.

No realistic prospect exists for resolution of the conflict without a decision by this Court. Every circuit purports to have settled on one standard or the other.[3]

II. The Standard Set by the Court of Appeals is Erroneous

This Court has not directly addressed the applicable standard for deciding claims of due process violations resulting from pre-indictment delay since its decisions in

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v. Savoy Reinsurance Co. Ltd., 938 F.2d 6, 64 (7th Cir. 1991) ("one panel may not overrule another without circulating the decision to the full court under Circuit Rule 40(f)").

[3] Two of the "bad-faith" circuits, however, have competing lines of cases, with a few panel opinions employing the balancing test. *See, e.g., United States v. Comosona*, 614 F.2d 695, 696 (10th Cir. 1980) (employing balancing test); *Stoner v. Graddick*, 751 F.2d 1535, 1542 n. 4 (11th Cir. 1986) (discussing alternative balancing test in 11th Circuit opinions). Neither circuit has issued an *en banc* decision designed to resolve conflicts between panels within the circuit. The rule in both circuits is that one panel cannot overrule another. *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993), *cert. denied*, 115 S.Ct. 53 (1994); *United States v. Grisham*, 63 F.3d 1074, 1079 n. 4 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 798 (1996). All recent panel opinions in both of those circuits, however, regard the bad-faith test as the settled law of those circuits.

United States v. Marion, 404 U.S. 307 (1971), and *United States v. Lovasco*, 431 U.S. 783 (1977).[4] In *Lovasco* this Court decided that, because "neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay" the Court would "leave to the lower courts, in the first instance, the task of applying the settled principles of due process ... to the particular circumstances of individual cases." *Id.* at 796-97. In *Marion* this Court stated that the due process inquiry "will necessarily involve a delicate judgment based on the circumstances of each case." 404 U.S. at 324. Despite this Court's call in *Lovasco* and *Marion* for flexibility and delicate judgment, the Court of Appeals established an excessively rigorous standard for all cases -- a standard that no federal defendant ever has satisfied.

The Court of Appeals recognized in its decision below that it was in direct conflict with certain other federal courts of appeals, which employ the balancing test. *Crouch*, 84 F.3d at 3868 n. 13; Appendix A34-A35.

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[4] This court, in *dicta*, has recited language from *Lovasco*, which accepted a concession by the government that a showing of actual prejudice resulting from intentional delay for a tactical advantage would establish a due process violation. *United States v. Gouveia*, 467 U.S. 180, 192 (1984). Courts employing a balancing test do not regard the *Lovasco-Gouveia* language as establishing a standard. *See, e.g., Howell v. Barker*, 904 F.2d 889, 894 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990) ("The Court [in *Gouveia*] was merely restating in *dicta* the established outer contour of unconstitutional preindictment delay").

Nevertheless, the opinion ridiculed the balancing of prejudice against reasons for delay as "a 'length of the Chancellor's foot' sort of resolution," or an attempt to "compare the incomparable .... [with] no scale or conversion table ... no recognized general standards or principles ... and virtually no body of precedent or historic practice to look to for guidance." *Crouch*, 84 F.3d at 3870; Appendix A37-A40. The Court of Appeals ignored the fact that such balancing, with prejudice on one side and reasons for delay on the other, has been mandated by this Court in the speedy trial context, *Barker v. Wingo*, 407 U.S. 514 (1972), and has been performed regularly by federal courts for the last quarter century in similar contexts. *Crouch*, 84 F.3d at 3884 n. 9; Appendix A67-A70 (Politz, C.J., dissenting). "Divining and 'weighing' prejudice will not be easy, but our courts must attempt it when the delay is of questionable length." *State ex rel. Leonard v. Hey*, 269 S.E.2d 394, 398 (W.Va. 1980). The Fifth Circuit's decision below is a broadside against the *Barker* balancing test. The Fifth Circuit's excessive demand for precision and its apparent antipathy toward a balancing test are antithetical to both due process and speedy trial principles.

The circuits that have rejected the bad-faith test in favor of the balancing test have relied on precedent, logic, fairness, practicality, and common practice:

> Taking [the bad-faith] position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the

> community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive.

Howell, 904 F.2d at 894. "Once the defendant has cleared the monumental hurdle of proving prejudice, the government should explain its reasons. How else is the defendant to know why the government waited so long to indict him?" *Sowa*, 34 F.3d at 451 (logical, practical, and standard practice for government to explain delay after accused has proven prejudice). Not surprisingly, no reported federal appellate decision ever has sustained a finding of intentional delay for a tactical advantage or other bad faith purpose.[5] A burden that no defendant can satisfy cannot be the constitutionally correct one.

III. The Question Is Important

Whether due process claims of this type are to be decided by the exercise of the "delicate judgment" of the trial courts, *Marion*, 404 U.S. at 324, employing a balancing test, or by imposing on the defendant a double

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[5] In *United States v. Scott*, 579 F.2d 1013 (6th Cir. 1978), *cert. denied*, 440 U.S. 929 (1979), the court summarily affirmed the district court's pre-*Lovasco* dismissal of two counts of a three-count indictment (at the close of the government's case), "on the basis of pre-indictment delay and the prejudice the district judge found that it caused to defendant's case." *Id.* No mention was made of *Marion* or *Lovasco*, intentional delay for a tactical advantage or other bad-faith purpose, or even the government's reasons for delay.

burden of showing prejudice and bad faith is an important question. Establishment of the standard is especially important for the large class of cases like this one, resulting from the savings and loan crisis of the 1980's. Congress doubled the statutory limitations period from five to ten years, well beyond the normal period for persons or businesses to keep records. Congress did so **after the offenses allegedly were committed**, in order to facilitate prosecution, not to protect against stale charges. The extension of the limitations period, effective in 1990, coincided with congressional findings that the Department of Justice had been dilatory in bringing such prosecutions, especially in the jurisdiction in which the present case arose. *The U.S. Government's War against Fraud, Abuse, and Misconduct in Financial Institutions: Winning Some Battles But Losing the War*, H.R. Rep. No. 101-982, 101st Cong., 2nd Sess. (1990) at 70-72.

In such cases, the presumption that the statute of limitations provides sufficient protection should be reduced, and due process concerns should be heightened. The decision of the Court of Appeals overvalues the extended limitations period and will "encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority." *Crouch*, 835 F.Supp. at 946; Appendix C18-C20. The "relative unimportance" of a case does not justify ignoring constitutional commands. *Doggett v. United States*, 505 U.S. 645, 653 (1992).

REASONS FOR GRANTING THE PETITION AS TO THE SECOND QUESTION PRESENTED

In requiring that trial courts must wait until after trial to find pre-indictment prejudice and to dismiss the indictment for a due process violation, the Court of

Appeals has decided an important question of federal law that has not been, but should be, decided by this Court, and that was expressly reserved by this Court nearly twenty years ago. Additionally, the Court of Appeals opinion conflicts in principle and practice with other courts of appeals and state courts of last resort.

I. The Question Presented Is Important

In *Lovasco* this Court expressly reserved the question whether a trial court must wait until after trial to make prejudice findings and to dismiss a case for pre-indictment delay. *Lovasco*, 431 U.S. at 788 n. 7. The Fifth Circuit, noting the reservation of the question by this Court in *Lovasco*, has undertaken to answer it in the affirmative:

> [I]t is difficult to imagine how a pretrial showing of prejudice would not in almost all cases be to some significant extent speculative and potential rather than actual and substantial .... [A]t least in all but the very clearest and most compelling cases, the district court, rather than grant such a motion prior to trial, should carry it with the case, and make the determination of whether actual, substantial prejudice resulted from the improper delay in light of what actually transpired at trial.

Crouch, 84 F.3d at 3874-75; App. A46-A50. The Court of Appeals later reiterated the holding: "[D]ismissal on such a basis *prior to trial* will rarely (if ever) be appropriate. In all but the clearest and most indisputable cases, the district court, even though inclined to grant such a motion, should

nevertheless normally withhold doing so until after verdict .... " *Id.* at 3883; Appendix A65-A67 (emphasis in the opinion). The Court of Appeals further ordered that the district court in the present case "shall not grant the motion to dismiss unless and until the events of trial demonstrate, and the court finds, actual and substantial trial prejudice to the defense as the result of improper and undue delay...." *Id.* n. 46; Appendix A66.

> As the Chief Judge stated in his opinion below: In addition to the economic and other costs associated with an unnecessary trial, additional interests are imperiled. It is not merely fanciful to envision meritorious defenses, including constitutional claims, which might go begging for fear of a more harsh punishment if the matter proceeds to verdict. Our system of justice does not gain thereby.

Crouch, 84 F.3d at 3885 n. 14; Appendix A70 (Politz, C.J., dissenting). "Administrative judicial efficiency, if nothing else," justifies considering a pre-indictment delay claim "before the time and money involved in a trial are expended unnecessarily." *State ex rel. Leonard v. Hey*, 269 S.E.2d 394, 399 (W.Va. 1980) (state due process analysis). This Court should grant the writ to decide the important question of federal law involved.

II. The Court of Appeals Decision Conflicts in Principle and Practice with Other Courts of Appeals and with State Courts of Last Resort

The rule in federal and state courts is that a finding of prejudice, whether made pretrial or postrial, will be sustained on appeal, unless the finding is clearly erroneous or an abuse of discretion. *See, e.g., United States v. Foxman*, 87 F.3d 1220, 1222-24 (11th Cir. 1996) (upholding pretrial finding of prejudice but remanding for bad-faith finding); *State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996) (upholding both pretrial prejudice finding and dismissal of indictment). The Fifth Circuit stated that it was aware of no reported federal decision since *Lovasco* that has sustained a *pretrial dismissal* for a due process violation resulting from pre-indictment delay. *Crouch*, 84 F.3d at 3874. The Fifth Circuit neglected to mention that there is no reported federal appellate decision that has sustained a trial judge who, after *Lovasco*, dismissed an indictment on such grounds *at the end of trial*.[6] The lack of reported appellate decisions does not illustrate the proper procedure to follow; it shows how difficult the actual prejudice standard is to satisfy at any stage of the proceedings, whether before or after trial. *See, e.g., United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992) (noting "heavy burden" imposed by actual prejudice standard)[7]; *Sowa*, 34 F.3d at 450-51 (sustaining trial court's

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[6] The only reported federal appellate decision that has upheld a post-*Lovasco* dismissal on the ground that due process was violated by pre-indictment delay is *Howell, supra* note 4. The finding of a due process violation in *Howell* was not made by the trial judge at the end of trial; it was made by a federal district court on *habeas corpus*, six years after the trial in state court. The Fourth Circuit employed the balancing test.

[7] The *Huntley* court found only two cases since 1975 in which any circuit has upheld a due process claim. *Id.* (citing *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976); *Howell, supra* note 4).

pretrial prejudice finding but labelling decision as first of its kind in 7th Circuit).[8]

The question, however, should be whether a pretrial *finding* of prejudice has been sustained on appeal, not whether a pretrial *dismissal* has been upheld. No other federal circuit has mandated that trial courts wait until after trial to make a finding of prejudice and to dismiss an indictment for pre-indictment delay. The Fifth Circuit's decision effectively substitutes *de novo* review for the well-established rule that trial court determinations of prejudice are to be sustained unless clear error or an abuse of discretion. This Court should grant the petition to review the conflict in principle and practice between the Fifth Circuit's decision and the deference shown trial judges' determinations in other circuits and in the state courts.

REASONS FOR GRANTING THE PETITION AS TO THE THIRD QUESTION PRESENTED

In holding that presumed prejudice cannot be considered together with actual prejudice in shifting the burden to the government to explain the reasons for pre-indictment delay, the Court of Appeals has decided an

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[8] The *Sowa* opinion does not disclose whether the district court made the finding of prejudice before or after trial. The case file, however, shows that the district court found actual prejudice before trial. Telephone Interview with Michael Huft, law clerk for Hon. Paul E. Plunkett, United States District Judge, N.D. Ill. (Aug. 13, 1996). Despite the finding of prejudice, the district court denied the motion to dismiss and proceeded to trial, and the court of appeals affirmed.

important question of federal law that has not been, but should be, decided by this court, and the Court of Appeals has answered the question erroneously.

I. The Question Presented Is Important

In *Marion*, this Court held that "the real possibilit[ies] of prejudice inherent in any extended delay .... are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment." *Marion*, 404 U.S. at 325. In *Doggett v. United States*, 505 U.S. 647, 656 (1992), however, this Court held that prejudice could be presumed from post-accusation delay in the speedy trial context, and that such presumed prejudice forms part of the "mix of relevant facts" under the speedy trial balancing test. This Court has not addressed the question whether actual prejudice and presumed prejudice can be sufficient, when considered *together* in the due process context, to shift the burden to the government to justify the delay.

The District Court in the present case borrowed the *Doggett* doctrine. Noting that Crouch alleged approximately the same length of delay and exactly the same kind of prejudice as Doggett, the District Court reasoned as follows:

> Memories do not dim over time any less for the purpose of the Fifth Amendment than for the purpose of the Sixth. Indeed, a better argument can be made that the presumption should be even stronger in regard to pre-indictment delay. Once an accused is charged with an offense, he will, presumably, seek counsel, begin to prepare a

> defense, preserve important evidence, interview significant witnesses, and make an effort to memorialize exculpatory evidence. When one is unaware of the possibility of being accused, he has absolutely no motivation to take these precautionary measures.

Crouch, 835 F.Supp. at 942-43; Appendix C9-C13. *Accord, Marion*, 404 U.S. at 331 n. 4 (Douglas, J., concurring) ("Indeed, the possibility of such prejudice may be greater in preprosecution-delay cases than in post-indictment delay cases"). The District Court agreed with the Magistrate Judge that presumed prejudice "cannot be ignored" in the present case. *Crouch*, 835 F.Supp. at 943; Appendix C11-C13. Both the Magistrate Judge and the District Court considered presumed prejudice along with actual prejudice as part of the mix in the balancing process. *Crouch*, 84 F.3d at 3872 n. 25; Appendix A43-A44. The Fifth Circuit reversed on that issue.

The question is important because of the extreme difficulty of establishing actual prejudice. The Ninth Circuit recently surveyed the federal circuits and found that, because of the "heavy burden" of proving actual prejudice, only two cases existed in which due process pre-indictment delay claims had been upheld. *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992). Other circuits have recognized the issue of the *Doggett* decision's effect on due process analysis but have dismissed claims of presumed prejudice without definitive treatment. *United States v. Anagnostou*, 974 F.2d 939, 942 n. 1 (7th Cir. 1992), *cert. denied*, 507 U.S. 1050 (1993); *United States v. Bischel*, 61 F.2d 1429, 1436 (9th Cir. 1995); *United States v. Foxman*, 87 F.3d 1220 (11th Cir. 1996). *But cf. State ex*

rel. Leonard v. Hey, 269 S.E.2d 394, 398 (W.Va. 1980) (prejudice presumed in state due process analysis). "[T]he right itself arises from the substantial prejudice that is presumed to affect a defendant's ability to respond to charges against him when the charges are time-worn and stale." *Id.* The federal courts of appeals are waiting for a "clear signal" from this Court "as to whether or not prejudice may be presumed for due process purposes on the same or a relatively similar basis as under the "Sixth Amendment." *Pharm v. Hatcher*, 984 F.2d 783, 786 n. 5 (7th Cir.), *cert. denied*, 510 U.S. 841 (1993). Nothing short of a decision by this Court will settle the question.

II. The Decision of the Court of Appeals Is Erroneous

The Fifth Circuit held below on doctrinal grounds that "[t]he district court's reliance on the Supreme Court's *Doggett* decision was misplaced because *Doggett* was a Sixth Amendment post-indictment delay case." *Crouch*, 84 F.3d at 3872-73; App.A42-46. In *Doggett*, however, the government had conceded "the presumption of prejudice that normally would attend a delay of the length involved in this case." *Doggett*, Brief for the U.S. at 18-19. The government had argued that Doggett's kind of presumed prejudice -- faded memory and other lost evidence -- is appropriately considered under the Due Process Clause, not the Speedy Trial Clause, but this Court held that speedy trial doctrine and due process doctrine are not mutually exclusive in that regard. *Doggett*, 407 U.S. at 532 n. 2.

The Fifth Circuit's decision rested on the erroneous unstated premise that a wall exists between Fifth Amendment due process doctrine and Sixth Amendment speedy trial doctrine. To the contrary, this Court has borrowed speedy trial doctrine for use in the context of due process challenges to government delay. In *United States v. $8,850*, 461 U.S. 555, 564 (1983), this Court adapted the speedy trial balancing test to a due process analysis of

government delay in forfeiture proceedings. In *Doggett* this Court rejected the government's attempt to use due process doctrine against the petitioner's speedy trial claim. *Doggett,* 407 U.S. at 532 n. 2. In this case the Court should reject the attempt to use the *Doggett* doctrine against the petitioner's due process claim.

CONCLUSION

Petitioner respectfully asks the Court to determine the standard to be applied in deciding whether an accused has been denied due process as a result of pre-indictment delay, as well as the important question whether a trial court must wait until after trial to make prejudice findings and to dismiss an indictment for a violation of due process resulting from pre-indictment delay.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

A Guy CROUCH, III and Michael J. Frye, Defendants-Appellees.

No. 93-7719

United States Court of Appeals,
Fifth Circuit.

May 30, 1996.

Defendants charged with bank fraud moved to dismiss on grounds of preindictment delay. The United States District Court for the Southern District of Texas, Samuel B. Kent, J., 835 F.Supp. 938, dismissed, and government appealed. The Court of Appeals, 51 F.3d 480, affirmed. On rehearing en banc, the Court of Appeals, Garwood, Circuit Judge, held that: (1) for preindictment delay to violate due process clause, it must not only cause the defendant substantial and actual prejudice, but must have been intentionally undertaken by the government for the purpose of gaining some tactical advantage; (2) far stronger showing is required to establish actual and substantial prejudice before trial than would be required after trial, so that court should normally carry the motion with the case and determine it following the verdict; and (3) defendants did not establish, before trial, actual and substantial prejudice.

Reversed and remanded.

Politz, Chief Judge, dissented and filed an opinion in which Benavides, Circuit Judge, joined.

1. Indictment and information — 7

Prejudice caused by preindictment delay, alone, does not suffice to entitle defendant to dismissal of charges; requirements that there be substantial prejudice resulting from the delay and that the delay be an intentional measure to gain a tactical advantage are cumulative rather than alternative requirements.

2. Federal Courts — 452

Under the "two court doctrine," the Supreme Court will not undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error.

See publication Words and Phrases for other judicial construction and definitions.

3. Constitutional Law — 253(1), 255(1), 278(1)

Guarantee of due process has historically been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property, and due process clause is not implicated by lack of due care of an official causing unintended injury to life, liberty, or property. U.S.C.A. Const.Amend. 5.

4. Constitutional Law — 262, 265
Criminal Law — 145.5

Primary protection against undue prearrest and preindictment delay is statute of limitations, and due process clause has but limited role to play in that respect. U.S.C.A. Const.Amend. 5.

5. Indictment and Information — 7, 42

There is no general common law or constitutional duty to bring charges as soon as reasonably practicable.

6. Constitutional Law — 265

For preindictment delay to violate due process clause, it must not only cause accused substantial, actual prejudice, but delay must also have been intentionally undertaken by government for purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other impermissible, bad faith purpose; intentional delay for purpose of gaining tactical advantage would include delay for purpose of rendering unavailable evidence favorable to defense but would not include delay to affirmatively strengthen government's cause, such as delay until potential witness for the government becomes available by reason of plea bargain. U.S.C.A. Const.Amend. 5.

7. Indictment and Information — 7

Delay of over seven years in returning indictment did not establish substantial presumptive prejudice.

8. Indictment and Information —7

Actual prejudice, not presumptive prejudice, must be shown in order to entitle defendant to dismissal of charges because of preindictment delay.

9. Indictment and Information — 7

Speculative prejudice does not suffice to show actual prejudice due to preindictment delay, and vague assertions of lost witnesses, faded memories, or misplaced documents are insufficient; mere loss of potential witnesses is insufficient absent showing that their testimony would have actually aided the defense and, to establish prejudice based on lost witnesses or documents, defendant must show that the information could not be otherwise obtained from other sources.

10. Indictment and Information — 7

In determining whether defendant has suffered actual prejudice from preindictment delay, the loss of witnesses or documents which occurred prior to the time that the delay became improper are not considered.

11. Criminal Law — 577, 4

Unlike protection afforded by double jeopardy clause, speedy trial clause does not encompass a right not to be tried which must be upheld prior to trial if it is to be enjoyed at all. U.S.C.A. Const. Amend. 5,6.

12. Indictment and Information — 7

Far stronger showing is required prior to trial to establish requisite actual, substantial prejudice due to preindictment delay than would be required after trial and conviction and, while motion to dismiss on that basis may be filed and initially considered prior to trial court, in all but the

clearest most compelling cases, the district court should carry it with the case and make the determination of whether actual substantial prejudice resulted from the improper delay in light of what actually transpires at trial; better practice is to await the verdict rather than dismissing prior to the verdict following trial. Fed. Rules Cr.Proc.Rule 12(b)(1, 2), 18 U.S.C.A.

13. Indictment and Information — 7

Defendants were not able to establish before trial, actual and substantial prejudice from preindictment delay, despite claims of loss of testimony of witnesses and loss of documents, where some testimony and documents would not be contrary to government's case, it was not shown exactly what the testimony would have been or that the documents in fact existed, and some of the information appeared to be available from other sources.

Appeal form the United States District Court for the Southern District of Texas.

Before POLITZ, Chief Judge, and KING, GARWOOD, JOLLY HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, BARKSDALE, EMILIO M. GARZE, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.

GARWOOD, Circuit Judge:

In this prosecution for alleged savings and loan offenses, the district court, prior to trial, dismissed the indictment against Guy Crouch III (Crouch) and Michael Frye (Frye) for preindictment delay, notwithstanding that the statute of limitations has not run. *United States v. Crouch*, 835 F.Supp. 938 (S.D.Tex. 1993). The government appeals.

The district court, following a hearing before a magistrate judge, concluded that the delay was sufficiently extensive "to constitute substantial presumptive prejudice" and was also shown to "have resulted in some actual prejudice." *Id.* at 943. Characterizing the government's reasons for the delay as essentially "insufficient personnel available to investigate or properly prepare," the district court concluded that such reasons were "at best, entitled to only slight weight in the balance of due process considerations" and did not outweigh the "prejudice, actual and presumptive." *Id.* at 946. Although opining that the delay "certainly smacks of negligence," the court determined that "the record, in its present form, will not justify a finding of bad faith, but because of [discovery and evidentiary] limitations imposed by ... the Magistrate Judge, it can not be ruled out." *Id.* at 943 & n. 6.

A divided panel of this Court affirmed the dismissal of the indictment. *United States v. Crouch*, 51 F.3d 480 (5th Cir. 1995). The panel majority recognized that for pre-indictment delay "the triggering prejudice must be actual, not presumptive," but concluded that the district court's finding of actual prejudice was adequately supported. *Id.* at 484-485. Relying on *United States v. Townley*, 665 F.2d 579 (5th Cir.), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982), the panel majority further held that no showing of prosecutorial bad faith was required, and that instead the reasons for the delay would be balanced against the extent of the prejudice. *Crouch* at 483. The panel majority held that the government's reasons - "essentially, lack of manpower and the low priority which this investigation was assigned" - were "insufficient to outweigh the actual prejudice to Crouch and Frye." *Id.* We granted the government's suggestion for rehearing en banc.

We now reverse the district court's order dismissing the indictment. We hold that where the indictment is not

barred by the statute of limitations, dismissal for pre-indictment delay requires an appropriate showing not only of prejudice but also that the prosecution purposely delayed the indictment to gain tactical advantage or for other bad faith purpose. We further hold that the present record does not support a finding of the requisite actual, substantial prejudice - as opposed to potential prejudice - to justify dismissal prior to trial. "Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." *United States v. Marion*, 404 U.S. 307, 326, 92 S.Ct. 455, 466, 30 L.Ed.2d 468 (1971).

BACKGROUND

Offenses Charged

The instant indictment was returned November 12, 1992. It contains 19 counts. Crouch is named a defendant in all counts, and Frye is named a defendant in counts 1, 2, 8, 13, and 18. The only other defendant charged in the indictment - Kerry Shawell, charged in counts 1, 2, 9, 14, and 19 - had pleaded guilty, and agreed to cooperate with the government, before the hearing on the motions of Crouch and Frye to dismiss for preindictment delay. The indictment concerns seven loans, all of which closed June 28, 1985, made by Delta Savings Association (Delta), a federally-insured savings and loan association located in Alvin, Texas. Crouch was the Chairman of the Board of Delta, and a member of its loan committee, from approximately January 1985 until resigning in September 1986. He was also Delta's attorney, and was half owner, with his father, of the title company at which the loans in question, and apparently many other Delta loans, closed. The seven loans included: two (for $915,000 and $1,429,000) to Robert Ferguson, a real estate broker and investor, and his company, Ferguson C & D, Inc., to buy from Bankers Savings and Loan Association

(Bankers), a federally-insured savings and loan association located in Galveston, Texas, certain real estate on which Bankers had foreclosed (known as real estate owned, or REO); three loans (for $505,780, $825,300, and $1,200,000) to Mark Connally (Connally), two of which were for the purchase from Ferguson of the REO Ferguson and purchased from Bankers and one of which was an operating capital loan; one $3,950,000 loan to Frye, a real estate investor and developer, and his company, J.M.G. Financial Corporation (J.M.G.), to buy from Delta a Delta REO tract; and one $1,250,000 loan to Shawell and his company, Kerry Shawell Interests, Inc., to buy from Delta another Delta REO tract. The indictment charges false entries, 18 U.S.C. § 1014; misapplication of funds, 18 U.S.C. § 657; bank fraud, 18 U.S.C. § 1344; and conspiracy under 18 U.S.C. § 371 to commit those offenses.

The conspiracy and the bank fraud (executing and attempting to execute "a scheme and artifice to defraud Delta") were charged in counts one and two, respectively, and allegedly lasted from "about December, 1984 and continuing through on or about August 1985." The remaining counts are substantive counts, and are alleged to have been committed "on or about June 28, 1985" in counts 3 through 14, and "between June 1985 and August 1985" in counts 15 through 19. Counts 3 through 7 charge Crouch alone with section 657 misapplication of Delta funds as to, respectively, the two loans to Ferguson and the three loans to Connally. County 8 charges Crouch, aided by Frye, with section 657 misapplication as to the Frye loan; and count 9 charges Crouch, aided by Shawell, with section 657 misapplication as to the Shawell loan. Counts 10, 11 and 12 charge Crouch alone with section 1006 false entries as to, respectively, each of the three loans to Connally. Count 13 charges Crouch, aided by Frye, with section 1006 false entry as to the Frye loan; and count 14 charges Crouch, aided by Shawell, with

false entry as to the Shawell loan. Counts 15, 16, and 17 charge Crouch alone with section 1014 false statements as to, respectively, each of the three Connally loan applications. Count 18 charges Crouch and Frye with Section 1014 false statements as to the Frye loan; and count 19 charges Crouch and Shawell with Section 1014 false statements as to the Shawell loan.

While certain aspects of the government's theory of the case are not entirely clear, it is evident that the loans to Connally, Frye and Shawell are all alleged to be nominee loans, with Frye and Shawell being nominees for Ferguson, and Connally also, at least to some extent, being a nominee for Ferguson. It may further be the government's theory that Connally was also to some extent a nominee for the partnership of Ben Barnes and John Connally. The nominee status was in each instance allegedly at least in part for the purpose of avoiding loans to one borrower limitations, particularly as to Ferguson. The section 1006 false entry and section 1014 false statement counts are predicated on falsely identifying the particular nominee borrower (Connally, Frye, and Shawell) as being the true borrower.

Count one, the conspiracy count, appears to essentially allege the counts 3 through 19 substantive offenses as objects of the conspiracy. It alleges that Crouch, Frye, and Shawell conspired with each other and "with other individuals, both known and unknown." In response to a motion for bill of particulars, the government identified Carl Gerjes - who was president of Delta until he was discharged sometime during May or June 1985 - and Ferguson as "[t]he unindicted co-conspirators." The government also stated that "arguably" the term "may also cover" Barnes and Mark Connally.[1] The

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[1] The same grand jury, consistent with the government's recommendation, had declined to indict Barnes and Mark

conspiracy count also refers to activities in furtherance of the conspiracy by "Delta insiders," and the response to the bill of particulars states that "Delta insiders" refers to Gerjes, Cholakian, a Delta officer who succeeded Gerjes as president in May or June 1985, and Erskine, another Delta officer. The government's general theory of the case is set forth in its response below to Frye's motion to dismiss for failure to charge an offense, as follows:

> "1. Between December 1984 and June 28, 1985, defendant Crouch, Robert B. Ferguson and others devised a scheme to rid Delta's records of various tracts of real estate acquired by the thrift through foreclosure. Part of the scheme required that Ferguson provide persons willing to pretend to be bona fide buyers of the property and to sign loan contracts purporting to evidence their purchase of the Delta real estate.
>
> 2. In furtherance of this plan, Ferguson caused defendants Frye and Shawell to prepare loan applications, personal financial statements, board of directors' minutes, corporate resolutions and other documents portraying the defendants as intended purchasers of Delta real estate located near Houston, Texas. Additionally, the sham buyers signed Delta loan contracts purporting to finance the purchase in their name. It was the understanding of all parties that the named buyers were mere nominee borrowers on behalf of Ferguson. All parties to the scheme were aware that the use of nominee borrowers was

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Connally.

necessary in order to avoid loan to one borrower limitations.

3. In furtherance of the scheme defendant Frye submitted to Delta the documents described above and signed as borrower on the loan supporting the transaction. The wording of the documents was such that they represented to persons unfamiliar with the scheme defendant Frye's intent to buy the real estate and to be held personally liable on the real estate loan for the purchase. The documents omitted any declaration that the loan was a nominee loan intended to benefit Ferguson, defendant Crouch and others.

4. Defendant Frye participated in this scheme because he anticipated preferential treatment by Delta in future transactions. Additionally, defendant Frye believed that Ferguson was acquiring Bankers Savings and Loan Association of Galveston and that he - Frye - would receive preferential treatment there, as well."

At the July 1993 hearing before the magistrate judge, the government further explained its theory as follows:

"...as this deal was done, only Mr. Crouch was aware of everyone's identity and involvement. Mr. Ferguson was purchasing a savings and loan in Galveston. He was attempting to swap REO properties from Banker's to Delta. Delta had some REO properties it needed to get rid of and they were going to swap or sell their properties to Banker's through the person of Robert Ferguson.

Sir, Mr. Ferguson knows that properties were to be swapped. He did not know who was purchasing

the properties until just before the closing. He didn't know that Ben Barnes and Mark Connally would be brought in. We have evidence that he did not know that Mark Connally was to be substituted in as a nominee until literally at the closing.

There is no evidence to suggest that Ben Barnes or Mark Connally ever heard the names Kerry Shawell or Michael Frye. They only knew that there were loans that they were involved in and certain circumstances.

All of these loans took place on the same day. All of them were either closed at Defendant Crouch's office in Alvin; or with regards to Mr. Frye and Shawell, Robert Ferguson actually took those documents to those individuals and had them sign everything and had it notarized."

At this hearing, the government also essentially admitted it had no *direct* evidence of Frye's knowledge or involvement other than in respect to counts 8, 13, and 18, each relating to the $3,950,000 loan to him. To show Frye knew he was a nominee borrower, the government stated it would rely on expected testimony of Ferguson, Gerjes "and others, Mr. Shawell," admissions Frye made in July 1986 to Federal Home Loan Bank Board (FHLB) examiner Mims, and 1986 "letters of Mr. Frye and his attorney" to Delta stating that he "purchased the property as an accommodation to Mr. Crouch and Mr. Ferguson."

Another aspect of the government's theory of the case is reflected by Gerjes' testimony on cross-examination by the

government at the hearing before the magistrate judge.[2] Gerjes stated that in his capacity as Delta's president he had negotiated and dealt with Barnes and Mark Connally in regard to the charged Mark Connally loans as part of an effort to rid Delta of REO. He did not recall in this regard "any one person directing me" or "anyone saying definitely do this or you definitely do that," or "that anyone specifically assigned me" that responsibility. Typically, he would "report back to a loan committee meeting and tell them of my findings" and "about what" he was "negotiating with Barnes/Connally." Crouch was on the loan committee. Gerjes also testified that he was not at the June 28, 1985, loan closings because Crouch had fired him as Delta's president about a month earlier, although he remained "technically on the rolls of Delta for some time after that."

In its response to the motion for bill of particulars, the government described "Defendant Crouch's obtained benefit" from the various charged offenses as follows:

> "His law firm earned legal fees. His title company earned title related fees. He earned fees and bonuses related to his board of directors position. His actions kept the federal regulators from immediately taking over the institution which would have caused any stock owned by Crouch and his family to be worthless."

The record suggests that Crouch personally owned about 5% of Delta's stock. His father, who was not on the board at any time during or after 1985, owned about 34% of the stock, and another some 34% was owned by board member Gubert, who preceded Crouch as chairman.

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[2] Gerjes was called as a witness by Frye at the hearing.

Investigation

Delta was apparently placed under state supervision and control in May 1986, as reflected in a report of examination prepared by FHLB examiner Mims, a copy of which is attached as an exhibit to Crouch's motion to dismiss for preindictment delay.[3] Delta was apparently completely taken over by the authorities in September 1986. The report attached to Crouch's motion concerns many aspects of Delta's operations and financial condition, and includes specific questioning of certain loans, including the seven loans at issue here, as well as, among others, certain unrelated loans to one Carl Vaughan. The report concludes, among other things, that: [a]ll aspects of the JMG and Shawell transactions indicate that JMG and Shawell were acting as nominees for Ferguson C & D, Inc.," that there were "willful violations of the loans-to-one-borrower limitation" with respect to Ferguson, among others, that review of title company and Delta records pertaining to the seven loans reflect "an apparent attempt by the association and borrowers to misrepresent material facts," that "certain aspects of the transaction appear to fall within the purview of Title 18, United States Code Section 1001," and that "[t]he examiner concludes that the Loan Committee was aware of the material violations of the loans-to-one-borrower limitations." This report likewise reflects the following statements by then Delta president Cholakian:

> "In response to the loan underwriting deficiencies uncovered during the examination, President Terry Cholakian stated that Former Managing Officer Carl Gerjes and former Senior Vice

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[3] Although this document states that it is a report of "Examination As Of March 10, 1986," it refers to events occurring well after March 1986.

President of Real Estate Lending W. A. Erskine had little regard for loan underwriting regulations. According to Ms. Cholakian, Messrs. Gerjes and Erskine were primarily concerned with closing loans now and worrying about regulations later.

... President Cholakian remarked that prior to July 1985, loans were closed outside of the Loan Committee. Messrs. Gerjes and Erskine agreed to loan commitments first and then presented the details to the full committee, at which point all committee members were expected to sign. Loan Committee procedures have changed since July 1985. According to Ms. Cholakian, all loans are now approved during committee meetings, and underwriting guidelines and procedures have been established.

...

President Cholakian provided the following statement with regard to the transactions involved with the aforementioned two escrow closings [Frye and Shawell]:

'In addressing the situation on the Ferguson direct loans and nominee loans, I have informed you and your staff that neither I, nor any other member of current management, has all of the facts surrounding this arrangement. This was put together by the former president, Carl Gerjes, and I have not been able to find any written documentation or clarification of the transactions. I have also not been able to find any written agreements that outline the transaction and expected actions of the parties.

'It has become clear to us, here now, that JMG and Shawell are nominees for Ferguson. We had to deduce that from the subsequent actions and

responses of JMG and Shawell on requests for financial statements and interest payments . . . .'"

In August 1986, the FHLB examiner sent "criminal referrals" to the FBI and the United States Attorney with respect to Delta concerning at least these seven loans and the Carl Vaughan transactions, and at least the former implicated Crouch and Frye, among others, though Crouch's name was not among the target names listed on the cover sheet (whether Frye's was is not stated). FBI special agent Kettler, in charge of the Delta investigation during most of the time thereafter, testified that such a referral was "generally a summary of an event or a transaction that the examiner feels that needs to be looked into as far as possible criminal involvement or needs some work for a criminal investigation." Kettler testified he worked on the matter off and on since then, but not on a concentrated basis until 1991. In April 1987 Kettler received another FHLB criminal referral in reference to "bonuses" - apparently some form of kickbacks - paid Gerjes (and also involving Cholakian) in 1983 and 1984. He focused on this because of the five-year statute of limitations.[4] Gerjes was indicted for these "bonus" offenses in the summer of 1989, and was tried and convicted of them later that year. Crouch's father testified against Gerjes at this trial and though Crouch did not testify he apparently had been subpoenaed by the government and was ready to testify to identify records. In July 1987, Kettler received still another FHLB criminal referral concerning Delta, this time also in relation to certain other matters not involved in this case. In August 1986 in the Galveston area of the Southern District of Texas - the locus of the offenses at issue - there were only three FBI agents, and there was no financial analyst or similarly skilled

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[4] The statute of limitations was extended to ten years effective August 1989, except offenses as to which the statute had run prior to that time. 18 U.S.C. § 3293

person. Of the three agents, one worked exclusively on drug cases. Kettler and the other agent were responsible for all other federal offenses. A fourth agent was added in late 1987, but she was soon reassigned to Houston and did not return until the summer of 1988. During this time there were seven financial institutions, including Delta, under investigation by these two agents. There were also many other cases, including the "McConnell case," which came into Kettler's office about three months after the first Delta referral and which he described as "about the largest white collar fraud that we had in the Houston division." Kettler worked "exclusively" on that case for "six months or so." The disappearance of a young girl and a case of ongoing industrial espionage at Dow Chemical also each involved significant amounts of time priority was assigned to cases involving danger to human life, ongoing offenses, and cases in which limitations were close to running. A fifth agent was added in 1990, and a sixth and seventh and a financial analyst were added in 1991.

In 1990, after Gerjes' conviction and sentencing in the bonus case, Kettler began focusing more on Delta, gathering and examining documents. There were forty boxes of records. Kettler interviewed employees at Delta (some before Delta closed), and he interviewed Mims (with whom he had previously talked on the telephone) in 1991 and Frye some time in 1990 (after September of that year) or possibly 1991. In January 1992, Ferguson pleaded guilty to charges in connection with the instant transactions pursuant to a deal, and according to the government's response to Crouch's motion to dismiss, Ferguson "gave information which focused the government's investigation squarely on defendants Crouch, Frye and Shawell." In March 1992 Gerjes pleaded guilty to charges in connection with the instant transactions and likewise agreed to cooperate with the government. Gerjes' sentencing on this conviction has apparently been

postponed, as has Ferguson's sentencing, pending their testimony in Crouch and Frye's anticipated trial.

Frye testified before the grand jury in November 1992. Crouch never testified before the grand jury.

Crouch testified at the hearing before the magistrate judge on the motion to dismiss. He related that in the spring of 1986, when Mims examined Delta, Mims requested, and received from Crouch, the Delta records concerning the transactions in question and said "no, we do not" when Crouch asked "if he had any problems with me in connection with those transactions." Crouch also stated that he and his father was visited in 1989 by an Assistant United States Attorney in connection with the Gerjes bonuses prosecution and was told that he, Crouch, "was not the subject of an investigation." In September or October 1990, Kettler came to Crouch's title company to get documents consisting of or including those concerning these loans, and was furnished copies. Kettler, in response to Crouch's inquiry, said Crouch was not a subject of the investigation. Kettler returned in June or September 1991 with a subpoena and procured the original records.[5] Again on this occasion, Kettler responded "no" to Crouch's inquiry whether he ws a subject of the investigation. In March 1992, Crouch was told he was a subject of the grand jury investigation and might be indicted (Frye was also so notified at that time). Other aspects of Crouch's testimony and other evidence at the hearing before the magistrate judge are related below in connection with our consideration of the showing of prejudice. Frye did not testify before the magistrate judge.

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[5] Other evidence presented by Crouch indicated the records then procured may have consisted of or included documents related to other loans, and did not include those relating to Mark Connally.

Rulings Below

The magistrate judge recommended granting the motion to dismiss. He concluded that the delay in indictment was presumptively prejudicial, relying on *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), although recognizing *Doggett* was a Sixth Amendment case. He further opined that "[w]hile the Court must confess that Crouch and Frye cannot, for the most part, identify with specificity the actual harm they have suffered as a result of the eight year lapse of time," nevertheless they had "with the added assistance of the presumption attendant to the eight-year delay, proven the existence of substantial prejudice." Relying on *Townley*, the magistrate judge ruled that no showing of bad faith was required, stating "this Court will not, and need not, decide the issue of bad faith." Instead, the magistrate judge balanced the prejudice against the reasons for the delay. It weighed the balance in favor of the defense, noting that "low priority assigned to an investigation, overload of other investigative or prosecutive responsibilities, and insufficient personnel, similar to the reasons offered in the case at bar, are entitled to only slight weight in the balance." However, the magistrate judge did commend the current prosecutor's handling of the case since its assignment to him in May 1991.

The district court adopted the magistrate judge's report, except as modified and supplemented in the district court's opinion. *Crouch*, 835 F.Supp at 938. The district court found that there was presumptive prejudice under *Doggett* and that the defendants had also sown "some actual prejudice to supplement their reliance on the presumption." *Id.* at 943. Relying on *Townley*, the court did not require a finding of bad faith, which it correctly stated the record "will not justify." However, because of the discovery and evidentiary limitations imposed by the magistrate judge, the court stated that it "cannot be ruled out" and "may have to be

addressed on another day." *Id.* at 943 & n. 6. The court did state that the delay in indictment "certainly smacks of negligence." *Id.* at 943. The court concluded that Crouch was a "target" prior to Ferguson's guilty plea. *Id.* It did not find, however, and nothing in the record tends to show, that the government whatever it might otherwise have believed or suspected, could have presented a winnable case against Crouch without the testimony of either Ferguson, Gerjes, Shawell, or Frye. The court further held that the reason for the delay advanced by the government, "insufficient personnel available to investigate or properly prepare this case," was "at best, entitled to only slight weight in the balance," and was outweighed by the "prejudice, actual and presumptive," to the defendants, thus requiring dismissal of the indictment. *Id.* at 946.

DISCUSSION

Bad Faith Requirement

In *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971, the Supreme Court first addressed preindictment delay where limitations had not run. There, the district court had granted, prior to trial, the defendants' motion to dismiss which asserted that, although the statute of limitations had not expired, the 38-month pre-indictment delay violated their rights to due process and to a speedy trial under the Fifth and Sixth Amendments. *Id.* at 309-11, 92 S.Ct., at 458. The government appealed directly to the Supreme Court under former 18 U.S.C. § 3731. The Court held that the Sixth Amendment speedy trial clock did not start running until the return of an indictment or other formal charge "or else the actual restraints imposed by arrest and holding to answer a criminal charge." *Id.* at 320, 92 S.Ct., at 463. Though conceding that "[p]assage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and

otherwise interfere with his ability to defend himself," the Court also recognized that "[p]ossible prejudice is inherent in any delay however short; it may also weaken the Government's case." *Id.* at 321-22, 92 S.Ct., at 464 (footnote omitted). *See also id.* at 324, 92 S.Ct., at 465 ("Actual prejudice to the defense may result from the shortest and most necessary delay"). Two principal reasons were noted for declining to apply the Sixth Amendment to pre-indictment delay. First, "[a]llowing inquiry into when the police could have arrested or when the prosecutor could have charged would raise difficult problems of proof. As one court said, 'the Court would be engaged in lengthy hearings in every case to determine whether or not the prosecuting authorities had proceeded diligently or otherwise.'" *Id.* at 321 n. 13, 92 S.Ct., at 464 n. 13. Second and more prominently: "'the applicable statute of limitations . . . is the primary guarantee against bringing overly stale criminal charges'" (quoting *United States v. Ewell*, 383 U.S. 116, 122, 86 S.Ct. 773, 777 15 L.Ed.2d 627 (1966), and "[s]uch statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice. . . ." *Id.* at 322, 92 S.Ct., at 464.

> However, *Marion* went on to hold that: "the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay *in this case* caused substantial prejudice to appellees' rights to a fair trial *and* that the delay was an intentional device to gain tactical advantage over the accused." *Id.* at 324, 92 S.Ct., at 465 (emphasis added).

The Court also noted "we need not, and could not now, determine when and in what circumstances actual prejudice

resulting from pre-accusation delays requires the dismissal of the prosecution" and indicated such determination "will necessarily involve a delicate judgment based on the circumstances of each case." *Id.* at 325, 92 S.Ct., at 466. The Court then proceeded to reverse the order of dismissal, holding there was no Sixth Amendment violation and that, as to due process:

> "[n]or have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." *Id.* at 325, 92 S.Ct., at 466.

The opinion's final sentence noted that "[e]vents of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." *Id.*

The Supreme Court next addressed pre-indictment delay in *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct., 2044, 52, L.Ed.2d 752 (1977), which again involved a dismissal prior to trial. The the district court, following a hearing, dismissed the indictment because of a seventeen-month delay, during the last some six months of which a defense witness died, between the time the government had "all the information relating to defendant's alleged commission of the offenses" and its presentation to the grand jury. The "Government made no systematic effort in the District Court to explain its long delay" and a divided panel of the Eighth Circuit affirmed (as to all but one count), sustaining "the District Court's finding that the Government's actions were 'unjustified, unnecessary, and unreasonable'" and that the defense had been impaired by the witness's death. *Id.* at 786-88, 97 S.Ct., at 2047. The Supreme Court reversed.

It initially reiterated that "statutes of limitations. . . provide '"the primary guarantee, against bringing overly stale criminal charges"'" (quoting *Marion's* quoting of *Ewell*), and that "the Due Process Clause has a limited role to play in protecting against oppressive delay." *Id.* at 789, 97 S.Ct., at 2048. The Court next held that *Marion's* concluding sentence "establishes only that proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not that it makes the claim automatically valid." *Lovasco* at 789, 97 S.Ct., at 2048. "*Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Lovasco* at 790, 97 S.Ct., at 2048-49. The Court then observed that the due process clause affords protection "only" for violations of "those 'fundamental conception is of justice which lie at the base of our civil and political institutions'" (quoting *Mooney v. Holohan*, 55 S.Ct. 340, 342 (1935), and "does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment." *Lovasco* at 790, 97 S.Ct., at 2049. Further: "Judges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" *Id.* (quoting *Rochin v. California*, 342 U.S. 165, 170, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952)).

Lovasco next rejects the contention that the Constitution requires that charges be filed promptly "once the Government has assembled sufficient evidence to prove guilt beyond a reasonable doubt." *Id.* at 792, 97 S.Ct., at 2050. It notes that such a rule "would cause numerous problems in those cases in which a criminal transaction involves more than one person or more than one illegal act," and that "if courts were required to decide in every case when the prosecution should have commenced, it would be necessary

for them to trace the day-by-day progress of each investigation." thus burdening both prosecutors and courts. *Id.* & n. 14. It concludes in this respect: "We can find no such command in the Due Process Clause of the Fifth Amendment. In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused'. . . ." *Id.* at 795, 97 S.Ct., at 2051 (quoting *Marion*, 404 U.S. at 324, 92 S.Ct., at 465).[6] *Lovasco goes on to "hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been prejudiced by the lapse of time."* Id. at 796, 97 S.Ct., at 2051-52. Thus, the Court holds that the Court of Appeals erred in affirming the dismissal of the indictment. *Id.* at 796 98, 97 S.Ct., at 2052. In what might be described as a postscript, the *Lovasco* Court goes on to observe that "neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. We therefore leave to the lower

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[6] The *Lovasco* Court appended a footnote to this sentence stating:

> "In *Marion* we noted with approval that the Government conceded that a 'tactical' delay would violate the Due Process Clause. The Government renews that concession here, Brief for United States 32, and expands it somewhat by stating: 'A due process violation *might* also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.' *id.* at 32-33, n. 25. As the Government notes, however, there is no evidence of recklessness here." *Lovasco* at 795 n. 17, 97 S.Ct. at 2051 n. 17 (emphasis added).

courts, in the first instance, the task of applying the settled principle of due process that we have discussed to the particular circumstances of individual cases." *Id.*[7]

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[7] In a footnote appended to the first of these sentences, the Court observes that a law review article "has catalogued some of the non-investigative reasons for delay" and proceeds to quote several passages from the article, including its references to maintenance of an informer's cover. "'other motives . . . including some sinister ones,'" and its reference to the fact that "'various prosecutorial decisions - such as the assignment of manpower and priorities among investigations of known offenses - may also affect the length of such delays.'" *Id.* n. 19 (quoting Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 Stan.L.R. 525, 527-28 (1975)). The footnote then gives a "see also" citation to Justice Brennan's concurring opinion in *Dickey v. Florida*, 398 U.S. 30, 43-47 & n.9, 90 S.Ct. 1564, 1572-73 & n. 9, 26 L.Ed.2d 26 (1970). We observe that the indicated pages of Justice Brennan's concurrence in *Dickey* (in which Justice Marshall, author of *Lovasco*, joined) discuss considerations pertaining to whether the Sixth Amendment's speedy trial guarantee is applicable "to delays occurring *before* arrest or indictment." *Id.* ar 45, 90 S.Ct. at 1572. Justice Brennan's opinion remarks that "[d]eliberate governmental delay designed to harm the accused, however, constitutes abuse of the criminal process." *Id.* at 46, 90 S.Ct. at 1573. In a footnote, Justice Brennan also states, *inter alia*, "Delay, of course, may also result because the government lacks sufficient resources to move more quickly or because it negligently fails to act. When delay is not the result of an intentional attempt to strengthen the government's case, it will very likely make more difficult proof of the accused's guilt." *Id.* n. 9.

[1] Our decisions following *Marion* and before *Lovasco generally* construed *Marion* as stated in *United States v. Butts*, 524 F.2d 975, 977 (5th Cir. 1973), *viz*:

> "In *United States v. Marion*, . . . the Supreme Court held that the applicable statute of limitations being the primary guarantee against bringing overly stale criminal charges, one *must show* (1) that substantial prejudice resulted from the delay in seeking an indictment *and* (2) that the delay was an intentional measure to gain a tactical advantage *before* the indictment *can* be dismissed." (Emphasis added).

Other decisions of ours to the same effect include *United States v. Beckham*, 505 F.2d 1316, 1319 (5th Cir.), *cert. denied*, 421 U.S. 950, 95 S.Ct. 1683, 44 L.Ed.2d 104 (1975); *United States v. Duke*, 527 F.2d 386, 388, 390 (5th Cir.), *cert. denied*, 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1190 (1976); *United States v. Scallion*, 533 F.2d 903, 912 (5th Cir. 1976), *reh'g on other grds denied*, 548 F.2d 1168 (5th Cir. 1977), *cert. denied*, 436 U.S. 943, 56 L.Ed.2d 784 (1978); and *United States v. Manetta*, 551 F.2d 13552, 1354 (5th Cir. 1977). *See also United States v. Croucher*, 532 F.2d 1042, 1044 (5th Cir. 1976).[8]

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[8] One of our decisions in this time frame states in its text the rule essentially as stated in *Butts, Duke*, and our other above-cited cases, but in a footnote suggests that it could be an open question whether the two requirements as stated in *Butts* might be considered alternative, rather than cumulative, requirements. *United States v. Avalos*, 541 F.2d 1100, 1107 & n. 9 (5th Cir. 1976) *cert. denied*, 430 U.S. 970, 97 S.Ct. 1656, 52 L.Ed.2d 363 (1977). However, it is certainly now clear that delay caused prejudice alone does *not* suffice. *Lovasco*, 431 U.S. at 788-92, 794-98, 97 S.Ct. at 2048-49,

Since *Lovasco*, the overwhelming majority of our decisions have stated the rule essentially as we had stated it in *Butts, supra.* Thus, in *United States v. Willis*, 583 F.2d 203, 207 (5th Cir. 1978), we wrote that to prevail on a claim of preindictment delay "the accused *must* show that: (1) substantial prejudice resulted from the delay *and* (2) the delay was an intentional measure in order to gain a technical advantage." In *United States v. Durnin*, 632 F.2d 1297 (5th Cir. 1980), we rejected a due process claim of preindictment delay on the *sole* basis that the defendant had not shown a motive on the part of the prosecutor to use the delay for tactical advantage, and we did so without even evaluating the presence or extent of prejudice:

> "Appellant alleges that the delay denied him due process because he lost the testimony of an important witness in the interim between when the government could have brought an indictment and when it finally chose to do so. However, to establish a violation of the Due Process Clause in this context appellant *must show, not only* substantial prejudice flowing from an inordinate delay, *but also a motive on the part of the prosecutor to use the delay to gain a tactical advantage* . . . [citing *Lovasco, Marion,* and *Willis*]. Appellant does not contend that the government sought to delay his indictment for tactical advantage and the district court specifically found that the delay resulted from the government's good-faith attempt to ascertain appellant's guilt beyond a reasonable doubt. Trial Transcript, vol. 3, at 78. Since this finding is abundantly supported by the record, the district court's ruling on the motion to dismiss must be affirmed."

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[8](...continued)
2051-52. Hence, the requirements cannot be alternative.

Id. at 1299-1300 (citations and footnote omitted; emphasis added).

More recently, we wrote in *United States v. Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994), that: "To prove that preindictment delay violated his due process rights, a defendant must demonstrate that the prosecutor intentionally delayed the indictment to gain a tactical advantage *and* that the defendant incurred substantial prejudice as a result of the delay." (Emphasis in original). In all, since *Lovasco* at least twenty-nine different judges of this Court - including twenty-five of the thirty-three judges who have served either as active or senior judge of this Court since it split October 1, 1981 - have authored, or joined without reservation, unanimous published opinions in some eighteen different cases holding or stating in substance just what we said in *Byrd, Durnin*, and *Willis*.[9]

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[9] In addition to *Byrd, Durnin*, and *Willis*, the post-*Lovasco* published opinions referred to include: *United States v. Neal*, 27 F.3d 1035, 1041 (5th Cir. 1994) *cert. denied*, _____ U.S. _____, 115 S.Ct. 1165, 130 L.Ed.2d 1120 (1995); *United States v. Beszborn*, 21 F.3d 62, 65-66 (5th Cir.), *cert. denied*, ____ U.S.____, 115 S.Ct. 330, 130 L.Ed.2d 288 (1994); *United States v. Hooten*, 933 F.2d 293, 296 (5th Cir. 1991); *Dickerson v. Guste*, 932 F.2d 1142, 1144 (5th Cir.), *cert. denied*, 502 U.S. 875, 112 S.Ct. 214, 116 L.Ed.2d 172 (1991); *United States v. Delario*, 192 F.2d 766, 769 (5th Cir. 1990); *United States v. Varca*, 896 F.2d 900, 904 (5th Cir.), *cert. denied*, 498 U.S. 878, 111 S.Ct. 209, 112 L.Ed.2d 170 (1990); *United States v. Carlock*, 806 F.2d 535, 549 (5th Cir. 1986), *cert. denied*, 480 U.S. 949, 107 S.Ct. 1611, 94 L.Ed.2d 796 (1987); *United States v. Johnson*, 802 F.2d 833, 835, 836 (5th Cir. 1986); *United States v. Scott*, 795 F.2d 1245, 1249 (5th Cir. 1986); *United States v. Ballard*, 779 F.2d 287, 293

We recognize that language to the contrary may be found in scattered few of our opinions. For example, in *United States v. Brand*, 555 F.2d 1312 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063, 98 S.Ct. 1237, 55 L.Ed.2d 763 (1978), we rejected the defendant's preindictment delay claim because he had not demonstrated *any* prejudice. *Id. at 1316-1317. The* Brand panel then appended a footnote expressing its disagreement with the government's contention that "both actual prejudice and intentional tactical delay" had to be shown, asserting that instead the validity of a preindictment delay claim "depends on the due process balancing between the extent of the actual prejudice and the governmental interests at stake." *Id.* at 1317 n. 7. We did not there engage in any such balancing, however, for we had already found no actual prejudice (nor did we even identify or assess the reasons for the delay or "the governmental interests at stake"). The *Brand* footnote is pure dicta. The panel and the district court placed primary reliance on *Townley* - a quorum decision by two judges - where, in affirming Townley's conviction, we rejected his claim that the district court had erred in overruling his motion to dismiss for preindictment delay. The *Townley* panel concluded that "the lengthy preindictment delay somewhat prejudiced Townley," *id.* at 586, but was not due to "bad faith motive to prejudice" him.

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[9](...continued)
(5th Cir.), *cert. denied*, 475 U.S. 1109, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986); *United States v. Amuny*, 767 F.2d 1113, 1119, 1120 (5th Cir. 1985); *United States v. Wehling*, 676 F.2d 1053, 1059 (5th Cir. 1982); *United States v. Hendricks*, 661 F.2d 38, 39-40 (5th Cir. 1981); *United States v. Nixon*, 634 F.2d 306, 310 (5th Cir. 1981); and *United States v. Ramos*, 586 F.2d 1078, 1079 (5th Cir. 1978). Of course, there are also the numerous post-*Marion*, pre-*Lovasco* cases to the same effect, such as *Butts; Beckham; Duke; Scallion;* and *Manetta*.

Id. at 581. Relying on *Brand's* footnote 7, the opinion declined to affirm on that basis, but rather asserted that resolution of the issue "turns upon whether the degree of prejudice thereby sustained by the accused is sufficiently balanced by the good faith reasons advanced by the government." *Townley* at 582. We ultimately concluded that the way the trial had actually unfolded, and particularly the way the government had sought to prove its case, was such that the prejudice to Townley was not sufficiently substantial, when balanced against the reasons for the delay ("the press of other investigations. . .low-priority accorded to the present investigations and. . .changes of governmental prosecuting personnel." *id.* at 581), as to amount to a denial of due process.

Townley notwithstanding, it is plain that the vast majority of this Court's opinions have followed the contrary approach as reflected in *Butts, Durnin, Byrd,* and the other opinions cited in note 9, *supra.* Although as an en banc court we are not strictly bound by prior panel decisions, we now choose to follow the vast majority of our prior opinions in this respect and to reject the *Townley* approach.

[2] We recognize that neither *Marion* nor *Lovasco* is crystal clear on this issue, and each opinion contains some language that can give comfort to either view. However, we believe that the better reading of these opinions is that the Supreme Court, in instances where the statute of limitations has not run, has refused to recognize a claim of preindictment delay absent some bad faith or improper purpose on the part of the prosecution. Both *Marion* and *Lovasco* emphasize that "the primary" protection against pre-indictment delay is the statute of limitations, and that the due process clause has but a "limited role to play." *Lovasco* at 789, 97 S.Ct., at 2048. The only due process violation specifically recognized is where the delay not only "caused substantial prejudice" but also "was an intentional device to gain tactical advantage."

Marion at 324, 92 S.Ct., at 465. *Marion* reversed the dismissal for preindictment delay stating "there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." *Id.* at 325, 92 S.Ct., at 466. *Lovasco* rejects the notion that prejudice from preindictment delay is a sufficient, rather than merely a necessary, condition for relief, *id.* at 788-92, 794-97 S.Ct., at 2048-49, 2051-52. It likewise rejects the contention that the due process clause proscribes delay beyond the time the prosecution has assembled sufficient evidence to prove guilt beyond a reasonable doubt. *Id.* at 792-96, 97 S.Ct., at 2050-51. *Lovasco* refuses to proscribe investigative delay *because* such "delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" *Lovasco* at 795, 97 S.Ct., at 2051 (quoting *Marion* at 324, 92 S.Ct., at 465). Moreover, *Lovasco*, rather than remanding for reconsideration in light of its principles, flatly held that the dismissal of the indictment was error *despite* the findings of both the district court and the Court of Appeals that the delay not only caused actual prejudice to the accused but was also "'unjustified, unnecessary, and unreasonable,'" *id.* at 787, 97 S.Ct., at 2047, findings the Supreme Court never expressly disagreed with or determined to be clearly erroneous.[10] Indeed, both *Lovasco* and *Marion* indicate the undesirability of attempting to make such determinations. *See, e.g., Marion* at 321-323 & n. 13, 92 S.Ct., at 2050 & n. 14. Finally, neither *Marion* nor *Lovasco* mentions any

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[10] Indeed such disagreement would be most unusual, given the Supreme Court's well-established "two court" doctrine. *See* e.g. Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275-77, 69 S.Ct. 535, 538, 93 L.Ed. 672 (1949) (Supreme Court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

"balancing" or "weighing" of the extent of the prejudice against the relative merit of the reasons for the delay. Indeed, the closest thing to a reference to balancing is *Marion's* statement that limitations statutes "represent legislative assessments of *relative interests* of the State and the defendant." *Id.* at 322, 92 S.Ct., at 464 (emphasis added).

Crucially, the Supreme Court itself, albeit in dicta, appears to have interpreted *Marion* and *Lovasco* in essentially the same manner as we did in *Byrd, Durnin, Butts*, and our other cases cited in note 9, *supra*. Thus in *United States v. Gouveia*, 467 U.S. 180, 192, 104 S.Ct. 2292-2299, 81 L.Ed.2d 146 (1984), the Court stated:

> "But applicable statutes of limitations protect against the prosecution's bringing stale criminal charges against any defendant, *United States v. Lovasco, supra*, 431 U.S., at 788-789, 97 S.Ct., at 2047-2048; *United States v. Marion, supra*, 404 U.S. at 322, 92 S.Ct., at 464, and, beyond that protection, the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, *if* the defendant can prove that *the Government's delay* in bringing the indictment *was a deliberate device to gain an advantage over* him *and* that it caused him actual prejudice in presenting his defense. *United States v. Lovasco, supra*, 431 U.S., at 789 790, 97 S.Ct. at 2048-2049; *United States v. Marion, supra*, 404 U.S., at 324, 92 S.Ct. at 465." (Emphasis added).

More recently, in *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), the Court in support of its holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law," stated that:

> "Our decisions in related areas have stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government. In *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 458 (1971), we said that '[n]o actual prejudice to the conduct of the defense is alleged or proved, and there is showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.' *Id.* at 325, 92 S.Ct., at 466; see also *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977)." *Id.* at 57, 109 S.Ct. at 337.

A significant majority of our sister circuits appear to now follow the same rule, namely that where limitations has not run dismissal for preindictment delay requires a showing not only of substantial, actual prejudice, but also that the prosecutor intentionally delayed to gain tactical advantage or to advance some other improper purpose. *See, e.g., United States v. Mills*, 925 F.2d 455, 464 (D.C.Cir. 1991), *cert. denied*, 506 U.S. 977, 113 S.Ct. 471, 121 L.Ed.2d 378 (1992) (". . .pre-indictment delay . . . offends due process if the defendant can carry the burden of showing (1) that the government delayed bringing the indictment in order to gain a tactical advantage; and (2) that the delay caused him actual and substantial prejudice");[11] *United States v. Crooks*, 474 U.S. 996, 106 S.Ct. 421, 88 L.Ed.2d 362 (1985) ("An indictment brought within an applicable statute of limitations period is, constitutionally speaking, late *only* if the delay significantly prejudices the defendant *and* the government 'intentionally delayed' the indictment 'to gain an unfair tactical

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[11] In support of this statement, *Mills* cites, among other cases, *Gouveia* and our opinion in *United States v. Delario*, 912 F.2d 766, 769 (5th Cir. 1990). *Mills* at 464.

advantage or for other bad faith motives'"; emphasis added);[12] *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), *cert. denied*, 484 U.S. 1035, 108 S.Ct. 742, 98 L.Ed.2d 777 (1988);[13] *United States v. Ismaili*, 828 F.2d 153, 167 (3d

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[12] *Crooks* was authored by then Circuit Judge, now Justice Breyer. Other First Circuit opinions to the same effect as the above passage from *Crooks* and in which then Circuit Judge Breyer concurred include *United States v. Acevedo*, 842 F.2d 502, 504 (1st Cir. 1988); *United States v. Picciandra*, 788 F.2d 39, 42 (1st Cir.), *cert. denied*, 479 U.S. 847, 107 S.Ct. 166, 93 L.Ed.2d 104 (1986; and *United States v. Marler*, 756 F.2d 206, 213 (1st Cir. 1985). These authorities have more recently been reaffirmed in *United States v. McCoy*, 977 F.2d 706, 711 (1st Cir. 1992).

[13] In *Hoo*, the Second Circuit affirmed the denial of defendant's motion to dismiss for preindictment delay, stating:

> "Because appellant has made no showing of an improper prosecutorial motive, however, we find no deprivation of appellant's constitutional rights.
>
> In *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the Supreme Court held that the due process clause requires the dismissal of an indictment because of preindictment delay only when the delay causes 'substantial prejudice' to the defense and the delay is an 'intentional device to gain tactical advantage over the accused.' *Id.* at 324, 92 S.Ct. at 465. . . . In any event, appellant has failed to show that the government had improperly delayed his prosecution in order to gain a tactical advantage." *Id.* at 671.

Cir. 1987) ("to sustain a dismissal of charges on the grounds of pre-indictment delay pursuant to the Due Process Clause, a defendant must bear the burden of proving two essential facts; (1) that the government intentionally delayed in order to gain some tactical advantage over him, and that (2) this intentional delay caused the defendant actual prejudice"; footnote omitted); *United States v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992) ("This court has consistently read *Lovasco* to hold that 'dismissal for pre-indictment delay is warranted only when the defendant shows [1] substantial prejudice to his right to a fair trial *and* [2] that the delay was an intentional device by the government to gain tactical advantage'"); *United States v. Sowa*, 34 F.3d 447, 450 (7th Cir. 1994);[14]

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[13](...continued)
In his dissent from the denial of *certiorari* in *Hoo*, Justice White noted that the First, Third, Tenth, and Eleventh Circuits, as well as the Second, "required a showing of prosecutorial misconduct designed to obtain a tactical advantage over the defendant or to advance some other impermissible purpose in order to establish a due process violation." that the Fourth and Ninth Circuits applied a balancing test, and that there were intra-circuit conflicts in the Fifth and Seventh Circuits. *Hoo v. United States*, 484 U.S. 1035, 108 S.Ct. 742, 98 L.Ed.2d 777 (1988).

[14] In *Sowa*, the Seventh Circuit stated:

> "To establish that a pre-indictment delay violated due process, Sowa must prove that the delay caused actual and substantial prejudice to his fair trial rights, and there must be a showing that the government delayed indictment to gain a tactical advantage or some other impermissible reason. *United States v. Marion*, 404 U.S. 307, 325, 92 S.Ct. 455, 465,, 30

United States v. Engstrom, 965 F.2d 836, 839 (10th Cir. 1992) ("there must be both a showing of actual prejudice and evidence that the delay was purposeful in order to gain a tactical advantage . . . a defendant must meet his two pronged test"); *United States v. Hayes*, 40 F.3d 362, 365 (11th Cir. 1994) ("In this Circuit the defendant must show that he suffered substantial prejudice and that the delay was the product of deliberate action by the Government to gain a tactical advantage").[15]

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[14](...continued)

> L.Ed.2d 468 (1971) . . . . The district court . . .found that Sowa had proved actual and substantial prejudice resulting from the delay . . . .
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> . . . .
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> Sowa's claim, however fails to meet the requirements of the second prong. With respect to the government's delay, due process is only implicated if the government purposely delayed the indictment to take advantage, tactically, of the prejudice or otherwise acted in bad faith." *Id.* at 450.

[15] In *United States v. Stierwalt*, 16 F.3d 282, 285 (8th Cir. 1994), the Court rejected the defendant's claim of preindictment delay, stating "[u]nless there is a showing that the government intentionally delayed indictment to harass or to gain a tactical advantage, there can be no due process violation." The court also observed that "there is no intimation that the preindictment delay was intentional and designed to gain a tactical advantage over or to harass Stierwalt." The rule is similarly stated in *United States v. Scoggins*, 992 F.2d 164, 166-167 (8th Cir. 1993). However, in *United States v. Miller*, 20 F.3d 926 (8th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 226, 130 L.Ed.2d 152 (1994), the Court without citing *Stierwalt* or *Scoggins*,

We conclude that several other considerations also strongly militate against utilizing a *Townley*-type balancing test to determine whether prejudicial preindictment delay violates due process and in favor of requiring that the delay have been intentionally caused by the prosecution to gain a tactical advantage over the defendant or for some other bad faith purpose.

The *Townley* test purports to weigh or balance the extent or degree of the actual prejudice against the extent to which the government's "good faith reasons" for the delay deviate from what the court believes to be appropriate.[16] However, what this test seeks to do is to compare the incomparable. The items to be placed on either side of the balance (imprecise in themselves) are wholly different from each other and have no possible common denominator that would allow determination of which "weighs" the most. Not only is there no scale or conversion table to tell us whether eighty percent of minimally adequate prosecutorial and investigative staffing is outweighed by a low-medium amount

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[15](...continued)
stated that if actual prejudice is established "the court will then inquire into the reasons for the delay and balance those reasons against the demonstrated prejudice." *Id.* at 931. The Court ultimately affirmed the conviction, and stated in a footnote concerning periods of delay not "due to legitimate investigatory needs" that those "appear to be due to administrative delays, inertia or at worst negligence. We agree with the magistrate's finding that 'there was absolutely no evidence that the delay was for strategic reasons.'" *Id.* & n. 5.

[16] Inferentially, *Townley* would also grant relief whenever any actual prejudice resulted from delay intentionally caused to gain tactical advantage.

of actual prejudice, there are no recognized general standards or principles to aid us in making that determination and virtually no body of precedent or historic practice to look to for guidance. Inevitably, then, a "length of Chancellor's foot" sort of resolution will ensue and judges will necessarily define due process in each such weighing by their own "'personal and private notions' of fairness," contrary to the admonition of *Lovasco*.

[3-5] Apart from the above difficulty, grounding a due process violation on the basis of good faith but inadequate, ineffective, or insufficient governmental personnel or management leading to preindictment delay runs counter to two basic constitutional principles. In the first place, "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property," *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986), and hence "the Due Process Clause. . . is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Cannon*, 474 U.S. 344, 347, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986).[17]

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[17] Crouch and Frye argue by analogy to the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963), that a prosecutor's suppression of exculpatory evidence violates due process "irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S.Ct. at 1196. *Brady* - which relates to post-indictment conduct by the prosecution - might be a more cogent analogy if urged to support a contention that Sixth Amendment speedy trial rights are violated by prosecutorial post-indictment delay irrespective of the good faith or bad faith of the prosecution. With arrest or indictment, a variety of constitutional rights arise, as do more at trial itself. But, as

Contrary to these principles, however, the *Townley* test would find a due process violation where the government acted in good faith and did not deliberately seek to prejudice the party ultimately accused.

Finally, serious separation of powers concerns are implicated. Here, for example, the panel concluded that the reasons for the delay - "lack of manpower and the low priority which this investigation was assigned" - were "insufficient to outweigh the actual prejudice to Crouch and

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[17](...continued)
Marion and *Lovasco* make clear, the primary protection against undue prearrest and preindictment delay is the statute of limitations, and the Due Process Clause has but a limited role to play in that respect. There is no general common law or constitutional duty to bring charges as soon as reasonably practicable, and it has long been recognized that preindictment delay generally favors the defense. *See, e.g., United States v. Davis*, 487 F.2d 112, 119 (5th Cir. 1073, *cert. denied*, 415 U.S. 981, 94 S.Ct. 1573, 39 L.Ed.2d 878 (1974) ("'all practiced trial lawyers are well aware that the attrition from such delay is more damaging to the prosecution's case than to that of the defense. This will be so as long as the prosecution has the burden of proof.'"). Hence, the rule of *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988), that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process," provides a more apt analogy than that of *Brady* as the Supreme Court itself recognized in *Youngblood* by citing *Marion* and *Lovasco* in support of its said holding.

Frye." *Crouch* at 483.[18] Finding these reasons "insufficient" is in substance determining that greater manpower *should* generally have been allocated to investigation and prosecution in that jurisdiction, and that a higher priority *should* have been assigned to this particular investigation.[19] Yet those decisions are ones essentially committed to the legislative and executive branches, and the case for judicial second guessing is particularly weak where it is directed at preindictment conduct and is supported not by any specific constitutional guaranty or by any long-established tradition of judicial oversight, but only the general contours of the due process clause.

For example, the government has cited to us the following observations in a report of the House Committee on Government Operations issued some ten months before

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[18] Similarly, the *Townley panel accepted that much of the delay "was occasioned by the low priority assigned to this investigation and to the overload of other investigative and prosecutive responsibilities allocated to the available personnel,"* Townley at 582, and also "because of changes of government prosecuting personnel." *Id.* at 581. The panel indicated that had the accused not been only "somewhat" actually prejudiced - as it developed after trial - these reasons would have been insufficient and a due process violation would have occurred.

[19] If all the manpower that could reasonably be expected has been furnished and the highest reasonably appropriate priority has been assigned to the matter in question, but a due process violation has nevertheless been found despite the delay's being caused only by the insufficient manpower and the relative priority assigned to the matter, then the due process violation must necessarily rest on prejudice alone, contrary to *Lovasco*.

FIRREA extended the presently relevant limitations period to ten years,[20] *viz*:

> "19. a. Pending bank fraud investigations are overwhelming the Federal criminal justice system. There are acute shortages of sufficiently compensated and experienced prosecutors and investigators in most areas of the nation to handle these more complex cases.
>
> b. Timely investigations and/or prosecutions of many of the 3,340 pending FBI investigations involving losses of $100,000 or more is highly improbable, if not impossible without a substantial increase in the Justice Department's static budget."[21]

In response, Crouch's brief cites, *inter alia* a 1990 report of the same House Committee,[22] which he characterizes as having "found that shortages of personnel for the investigation and prosecution of such fraud and embezzlement (F&E cases were the result of the failure of the Executive Branch and the Department of Justice to request sufficient finding and to assign appropriate priorities."

What are we to make of all this? Are we to say that there would be no due process violation if the President had

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[20] See Pub.L. 101-73, Title IX, § 961(*l*)(1), Aug. 9, 1989, 103 Stat. 501; 18 U.S.C. § 3293.

[21] 2 Pulles, Whitlock, and Hogg FIRREA: *A Legislative History and Section-by-Section Analysis* Title IX (McGraw-Hill 1993) (quoting House Report 100-1088, October 18, 1988).

[22] H.R.Rep. No. 101-982, 101st Cong. 2nd Sess. (199).

vigorously and timely requested additional funds to investigate and prosecute these cases, but Congress had refused? Or, that even so we will find a due process violation because Congress shouldn't have refused? Of course, funds must come from somewhere. Are we to say that such additional funding is better than increasing taxes or the deficit or decreasing funding for some other programs? Are we to judge whether financial institution fraud should be assigned a higher priority than drug or other offenses? It seems to us that all those decisions are quintessentially the business of either the legislative or the executive branch, or both, rather than the judiciary. Yet, a *Townley* approach - so long as it actually tries to "balance" or "weigh" instead of merely find a due process violation on the basis of the extent of the prejudice alone - inevitably involves us in grading or evaluating the merit of resource allocation and management decisions that are properly the province of the executive and/or legislative branches. Delay due to such causes if fundamentally unlike intentional delay to gain tactical advantage or for other improper purpose.

[6] Accordingly, we reject the *Townley* balancing test and hold that for preindictment delay to violate the due process clause it must not only cause the accused substantial, actual prejudice, but the delay must also have been intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other impermissible, bad faith purpose.[23] We need not now attempt to catalogue

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[23] Intentional delay for the purpose of gaining tactical advantage would include delay for the purpose of rendering unavailable evidence favorable to the defense or which would tend to undercut the government's case. But, it would not include delay to affirmatively strengthen the government's

all possible "other" impermissible, bad faith purposes of intentional delay, although *Marion* indicates that a purpose "to harass" the defendant would be included. *Id.* at 325-27, 92 S.Ct. at 466.[24] As suggested by *Marion* and *Lovasco*, we leave that to further case-by-case development.

We turn now to the prejudice component of the due process claim.

Prejudice Requirement

General Principles

[7,8] As noted, we agree with the panel's holding, 51 F.2d at 483-84, that the district court erred in concluding that the length of preindictment delay established substantial presumptive prejudice.[25] All our precedents, as well as a fair

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[23](...continued)
case - such as delay until a potential witness for the government becomes available by reason of a plea bargain or the like - even to a level well beyond that reasonably thought necessary to preclude the granting of a post-verdict motion for judgment of acquittal under Fed. R. Crim. P. 29(c) (and such a purpose would not be impermissible.)

[24] Neither Crouch nor Frye has alleged any specific such "other" impermissible, bad faith purpose.

[25] The magistrate judge, whose report the district court approved and adopted as modified and supplemented by its opinion, likewise found such presumptive prejudice. And the magistrate judge and the district judge each also appears to have combined the presumed prejudice with the actual prejudice found and then weighed the total against the

reading of *Marion* and *Lovasco*, plainly indicate that actual, not presumptive, prejudice must be shown where complaint is made of preindictment delay. *See, e.g., United States v. Wehling*, 676 F.2d 1053, 1059 (5th Cir. 1982; *United States v. McGough*, 510 F.2d 598, 604 (5th Cir. 1975) ("when preindictment delay is asserted, actual prejudice and not merely the real possibility of prejudice inherent in any extended delay is a necessary element which must be shown"); *Butts* at 977 ("[t]he mere passage of times [does] not constitut[e] the type of actual prejudice necessary to set aside an indictment returned within the appropriate statute of limitations"). The district court's reliance on the Supreme Court's *Doggett* decision was misplaced because *Doggett* was a Sixth Amendment post-indictment delay case. *See United States v Beszborn*, 21 F.3d 62, 66 (5th Cir.) *cert. denied*, ___ U.S. ___, 115 S.Ct. 330, 130 L.Ed.2d 288 (1994).[26] *See also,*

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[25](...continued)
government's reasons for the delay.

[26] We explained in *Beszborn*:

> "The law is well settled that it is actual prejudice,not possible or presumed prejudice, which is required to support a due process claim. The applicable statute of limitations is the mechanism established by law to guard against possible, as distinguished from actual, prejudice resulting from the passage of time between crime and the charge, protecting a defendant from overly stale criminal charges. *United States v. Ewell*, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).
>
> The concept of presumed prejudice has no place in

e.g., Byrd at 1339; *United States v. Bischel*, 61 F.3d 1429, 1436 (9th Cir. 1995).

[9,10] The prejudice to be shown not only must be actual, rather than presumed or potential but must also be "substantial." *See, e.g., Marion* at 324, 92 S.Ct. at 465 ("substantial prejudice"); *United States v. West*, 58 F.3d 133, 136 (5th Cir. 1995) ("actual and substantial prejudice") *United States v. Royals*, 777 F.2d 1089, 1090 (5th Cir. 1985) ("actual and substantial prejudice,'" quoting *Marion);* United States v. Willis, 583 F.2d 203, 207 (5th Cir.) 1978) ("substantial prejudice"); *Butts* at 977 ("substantial prejudice"); *Beckham* at 1319 ("substantial actual prejudice"). Speculative prejudice does not suffice, *United States v. Parks*, 68 F.3d 860, 868 (5th Cir. 1995), and "[v]ague assertions of lost witnesses, faded memories, or misplaced documents are

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[26](...continued)

> a due process analysis, and the district court's reliance on *Doggett* is misplaced. *Doggett* was a case involving a Sixth Amendment speedy trial violation claim, due to post-indictment delay, rather than pre-indictment delay. The proper measure of a claim of prejudice due to preindictment delay is the due process standard of the Fifth Amendment, which requires a showing of actual prejudice. . . .
>
> The Supreme Court was clear in its directive that, "There is no need to . . . guard against mere possibility that . . . delays will prejudice the defense . . . since statutes of limitation already perform that function." *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)." *Id.* at 66.

Moreover, preindictment delay generally tends to favor the defense, not the prosecution. *See, e.g., United States v. Davis*, 487 F.2d 112, 119 (5th Cir. 1973), *cert. denied*, 415 U.S. 981, 94 S.Ct. 1573, 39 L.Ed.2d 878 (1974).

insufficient." *Beszborn* at 67. *See also West* at 136; *Royals* at 1090; *Wehling* at 1059. A mere loss of potential witnesses is insufficient absent a showing that their testimony "would have actually aided the defense." *Beszborn* at 66. *See also West* at 136; *Royals* at 1090; *Wehling* at 1059; *United States v. McGough*, 510 F.2d 598, 604 (5th Cir. 1975) ("death of some six potential defense witnesses," some of whom the defendant claimed "would have testified as to firsthand knowledge of several of the transactions" involved).[27] Moreover, to establish prejudice based on lost witnesses or documents, the defendant must also show that "the information . . . could not otherwise be obtained from other sources." *Beszborn* at 67. *See also Royals* at 1090 ("[D]efendant has failed to show that such evidence would not have otherwise been obtained").

[11] The actual, substantial prejudice - not merely possible or potential prejudice - must be shown is also consistent with the nature of the due process right in question. That right is one not to be "deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. 5. In the present context, deprivation will normally occur only by conviction and not simply by trial itself. *Cf. Olin v. Wakinekona*, 461 U.S. 238, 250, 103 S.Ct. 1741, 1748, 75 L.Ed.2d 813 (1983) "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement"). In *United States v. MacDonald*, 435 U.S. 850, 861, 98 S.Ct. 1547, 1553, 56 L.Ed.2d 18 (1978), the Supreme Court held that "[u]nlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not .

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[27] And, of course, loss of witnesses or documents occurring before the delay becomes improper are not considered. *See, e.g., Parks* at 868. *Cf. Walters v. Scott, 21 F.3d 683, 688-89 (5th Cir. 1994).*

. . encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all." The same conclusion applies, *a fortiori*, to due process claims of preindictment delay. We are aware of no authority to the contrary. The Supreme Court further stated in *MacDonald*:

> "Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. . . . The essence of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. Normally, is *only* after trial that that claim may fairly be assessed." *Id.* at 858-59, 98 S.Ct. at 1552 (emphasis added).

This, too, fully applied to claims of preindictment delay. The denial of relief before trial in no way precludes the accused, if convicted, from successfully demonstrating that the undue and improper preindictment delay substantially and unfairly prejudiced his ability to avoid that result. Thus in *Marion*, the Court reversed the pretrial dismissal for preindictment delay, but observed that "[e]vents of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." *Id.* at 326, 92 S.Ct. at 466.[28] *See also MacDonald* at 858-59,

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[28] We observe that the *Lovasco* Court, while reversing the dismissal prior to trial for preindictment delay, commented in a footnote that the government contended "that the District Court should have deferred action on the [defendant's] motion to dismiss [for preindictment delay] until after trial, at which time it could have assessed any prejudice to the respondent [defendant] in light of events at trial." *Id.* at 788 n. 7, 97 S.Ct. at 2048 n. 7. The Court declined to

92 S.Ct. at 1552 ("The denial of pretrial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial - when prejudice can *better* be gauged - would also be denied"; emphasis added).

[12] Necessarily, then, a far stronger showing is required to establish the requisite actual, substantial prejudice pretrial than would be required after trial and conviction. Indeed, it is difficult to imagine how a pretrial showing of prejudice would not in almost all cases be to some significant extent speculative and potential rather than actual and substantial. We are aware of no reported federal appellate decision since *Lovasco* that has sustained a pretrial dismissal for preindictment delay where the statute of limitations had not run.[29] This is not to say that a motion to dismiss on such a basis should not be filed and initially considered prior to trial. *Cf.* Fed.R.Crim.P. 12(b)(1) & (2). However, at least in all but the very clearest and most compelling cases, the district court, rather than grant such a motion prior to trial, should carry it with the case, and make the determination of whether actual, substantial prejudice resulted from the

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[28](...continued)
of this contention because it "was not raised in the District Court or in the Court of Appeals." *Id.*

[29] And, we are aware of only one such case prior to *Lovasco*, a 1976 decision by a divided panel of the Eighth Circuit in *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976). Shortly after *Barket*, another divided panel of the Eighth Circuit sustained the pretrial dismissal of three counts of a four-count indictment on a due process, preindictment delay basis, but was reversed by the Supreme Court in *Lovasco*.

improper delay in light of what actually transpired at trial.[30] A number of reported decisions in this and other circuits reflect such a method of proceeding. *See, e.g., Townley* at 581 (motion to dismiss considered at pretrial hearing, district court reserved ruling and subsequently denied motion after conclusion of the evidence; we affirmed); *United States v. Scott*, 579 F.2d 1013 (6th Cir. 1978) (motion to dismiss two counts of three-count indictment denied without prejudice prior to trial, granted after close of all the evidence, jury acquittal on remaining count; affirmed). *Cf. United States v. Glist*, 594 F.2d 1374 (10th Cir. 1979) (motions to dismiss for preindictment delay taken under advisement prior to trial and granted as to one of four counts after five days of trial; affirmed).[31]

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[30] Moreover, where the claim of preindictment delay is ruled on prior to trial, the defense, which will frequently be in the best position to find or unearth exculpatory evidence allegedly lost due to delay or evidence that may adequately replace or substitute for it, has every incentive *not* to diligently search for or produce such evidence. At trial, however, the incentive is just the opposite. Then if the evidence or some adequate substitute is not produced, we can have far more confidence that it really could not have been.

[31] Although it appears that in at least some of these cases the motion was ruled on prior to verdict, normally the much better practice will be to await the verdict rather than to dismiss - particularly where dismissal would be of an entire count forming a substantial part of the indictment - preverdict. This will allow the government to appeal the dismissal in the event of a guilty verdict (if the verdict is not guilty, the issue is moot) and, should the dismissal be set aside on appeal, will obviate the necessity of a new trial (which in any event might raise double jeopardy concerns).

Townley presents an instructive example of how a strong pretrial showing of substantial prejudice may ultimately dissolve in the unfolding of the actual trial itself. Townley and partner Owens were charged with mail fraud in connection wit inducing persons to purchase and invest in nonexistent vending machines. *Townley* at 582. Townley claimed that due to preindictment delay he was unable to show that he had really believed the machines would be produced and be a valuable investment for the purchasers. We concluded that the requisite substantial prejudice would have been shown "had the thrust of the government's case" as presented at trial "been that Townley well knew that he and Owens could not deliver the machine sold or that the scheme could not be successful." *Id.* at 583. We found no such substantial prejudice, however, *because* "the main thrust of the government's case." as presented at trial, "concerned [particular] misrepresentations made by Townley in the sale of the machines." *Id.* Townley also claimed prejudice from being unable to adequately corroborate his testimony that as soon as he discovered Owens' fraud, he took action to protect the investors. We rejected this based on the approach taken by the government at trial:

> "insofar as counsel was unable to corroborate Townley's testimony that (after he had discovered Owens' fraud) he had informed the financing company not to approve any further applications for credit by investor-purchasers, the government expressly stated it would not dispute Townley's testimony, and neither by argument nor evidence did it attempt to cast doubt upon his creditable act by Townley or upon his two customer-witnesses whose testimony tended to corroborate him. The government further made full disclosure of its files to Townley's attorney to aid him in the preparation of the defense." *Id.* at 585-86 (citation omitted).

And, we observed that the government did not use but "had available" a witness "who would have case doubt on Townley's exculpatory testimony." *Id.* at 586. We accordingly affirmed the district court's decision, after the close of all the evidence, to deny Townley's pretrial motion to dismiss for preindictment delay.

Similarly instructive is our opinion in *McGough*, reversing the district court's pretrial dismissal on account of preindictment delay. We described the defendant's claim as follows:

> "McGough's assertion of actual prejudice to his defense is based primarily upon the death of some six potential defense witnesses. Some of these witnesses, McGough claimed, would have testified as to firsthand knowledge of several of the transactions which entered into the government's calculation of the amount understated; the testimony of others might impeach government witnesses . . . . [T]he government asserted at the hearings that it had expected two of them to be government witnesses, rather than witnesses for the defense." *Id.* at 604.

Although we could "find no indication that the trial court weighed the contradictory factual assertions before stating that there was actual prejudice." *id.* at 604, we nevertheless did *not* remand for further findings in that respect, but rather ordered that "the case is remanded for a prompt trial." *Id.* at 605. In this respect we quoted *Marion*, at 325-27, 92 S.Ct. at 466: "Events of trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." *Id.* at 604-5. *See also, e.g., Robinson v. Whitley*, 2 F.3d 562, 571 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1197, 127 L.Ed.2d 546 (1994); *United States v. Rice*, 550 F.2d 1364, 1369 (5th Cir.),

cert. denied, 434 U.S. 954, 98 S.Ct. 478, 479, 54 L.Ed.2d 312 (1994).[32]

Prejudice in this case

[13] At this stage of the proceedings, any claim that Crouch and Frye will suffer actual and substantial trial prejudice from the preindictment delay - let alone be convicted - is purely speculative and unsupported by the record. So far as actual prejudice is concerned, there is simply no basis on which to conclude that this case will not be another *Townley*.

Crouch's main claim is that the delay caused him to lose the testimony of six witnesses who had died prior to the July 1993 hearing before the magistrate judge, namely: his father, who died in June 1992; Gubert, who died at some unspecified time in 1988; Tschearner, an employee of Bankers, who died at a wholly unspecified time before return of the indictment; Levy, a Bankers outside director and

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[32] In *Robinson*, the habeas petitioner claimed that the post-indictment delay caused him to lose two witnesses, one having died and the other no longer locatable, who "would have corroborated the 'alibi' he presented at trial." We rejected this claim stating, "By the trial's end, however, the prosecution had managed to blow so many holes in Robinson's alibi that the only effect their testimony would have had would be to have transformed Robinson's alibi from an incredibly tall tale to just a tall one." *Robinson*, 2 F.3d at 571. In *Rice*, in rejecting a preindictment delay claim, we observed, concerning the defendant's claim (pretrial) that the delay had allowed the government to procure evidence against him that at trial "[n]o such later acquired evidence was ever offered against any of the defendants." *Rice*, 550 F.2d at 1369.

chairman of its loan and executive committees who also died at a wholly unspecified time before the indictment; Carson, chairman of Vision Bank, who died in October 1992; and John Connally, who died June 15, 1993.

As to Levy and Tschearner, so far as this record discloses, they may well have died in 1987 or 1988, prior to any delay having become even arguable undue, and hence their "loss" could not be attributable to any improper delay. The same is true of Gubert, who for all this record shows may have died in January 1988, Moreover, there was no adequate showing that these three individuals could have contributed any testimony that was material or related to matters that could not otherwise be established. Levy was not claimed to have any knowledge at all of - much less any participation in - any of the transactions at issue. He would simply have testified how an outside director of a savings and loan association typically functioned and relied on management. There is no suggestion that similar testimony was not otherwise readily available. Tschearner, as a Bankers' employee, negotiated with Ferguson concerning his purchase from Bankers of its REO tracts, and, according to Crouch, would have testified that the only people Ferguson mentioned to Tschearner as individuals at Delta with whom Ferguson dealt were Gerjes and Erskine, and that Crouch was not mentioned. But this is not necessarily contrary to the government's theory of the case, and there is nothing to suggest that Ferguson will give contrary testimony or will not, indeed, confirm Tschearner's putative testimony that Ferguson did not mention Crouch to Tschearner. Further, Tschearner is not shown to have had any other knowledge or connection with the transactions at issue, and Fieselman, Banker's then president who signed on behalf of Bankers all the papers for its signature in the transactions in question,

was alive and available to testify.[33] As to Gubert, there was absolutely no showing or claim that he had any knowledge of or participation in any of the transactions in question. His putative testimony is essentially the same as that of Crouch's father, discussed below, and is insufficient to show prejudice for the same reasons.

Crouch's father died in June 1992, and accordingly the loss of his testimony - unlike that of Levy, Tschearner, and Gubert - is doubtless fairly attributed to any delay here that may be found undue and improper. However, Crouch does not claim that his father - who was not shown to have been a Delta officer, employee, or director at any of the times referenced in the indictment - ever had any knowledge whatever of, or in any way participated in, any of the charged transactions. Many of the matters Crouch says his father could have testified to - such as that Crouch, though a Delta director and chairman of its board, was not a Delta officer or employee and did not have an office on Delta premises, and that his father had testified against Gerjes in the bonus case - appear to be essentially undisputed as well as easily established by other evidence. While Crouch states his father would testify that "Gerjes misled my father, myself, other directors and shareholders of Delta," this is only of attenuated relevance at best, as it does not concern any of the transactions at issue. Moreover, there is no claim that similar testimony is not available from others of the several Delta

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[33] It was also asserted that Tschearner could testify as to the then value of the Bankers REO tracts. However, there is no claim that this information was not reasonably available from other sources; nor can the actual significance of such testimony be assessed on the basis of this record.

directors.[34] For example, this is what the FHLB report of examination relates that Cholakian (who succeeded Gerjes as president and had been a director since 1982) told the examiner, and there is nothing to indicate Cholakian is not available to so testify. Moreover, as noted, Gerjes, already convicted of taking illegal "bonuses" on Delta loans, may well admit to some misleading of Delta board members. We further observe that ample impeachment of Gerjes is available, wholly apart from any testimony of Crouch's father, by showing Gerjes' two prior convictions, his plea bargain, his involuntary termination from Delta, and the fact that Crouch's father testified against him, and Crouch was prepared to, in his 1989 bonus case conviction.

Crouch's fifth missing witness, Corson, had been chairman of Vision Bank, an institution not claimed by anyone to have any involvement whatever in the instant transactions. Nor does Crouch claim that Corson had any knowledge whatever of, or any participation in, any of the instant transactions. Crouch apparently thought Corson could have testified to wholly unrelated and unexplained Florida real estate transactions - occurring both before and after the transactions here at issue - involving Ferguson and Delta officer Erskine, to show "the type of person" each of them "is." Such unrelated transactions are at best of the most attenuated relevance. Moreover, Ferguson has already pled guilty to offenses involving the instant transactions, so his willingness to do that sort of thing is hardly inconsistent with the government's likely proof at trial. Nor is there any indication that Ferguson would deny his involvement in the Florida transactions, the nature of which is in any event

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[34] These same observations apply equally to Crouch's assertion that his father would testify "I had to rely on what the officers of the association told me."

wholly unexplained. This is likewise the case as to Erskine; indeed, there is no indication Erskine will likely testify.

Finally, Crouch claims John Connally, who died June 15, 1993, after a brief illness, would have been a favorable witness. It is unclear, however, that the loss of this witness is attributable to preindictment delay. Crouch was aware he might well be indicted about fifteen months before John Connally died, but apparently took no steps to interview him or the like. Moreover, the original trial setting in this case was for a time several months before June 15, 1993, and there is nothing to suggest John Connally would have been unavailable at the earlier trial setting. Nor is there any showing that his testimony would have been favorable. Crouch said "I feel like" Connally would have testified he did not consider himself or the Barnes-Connally partnership liable for the Delta loans to Mark Connally because John Connally's financial statement of some six months after the loans closed did not list them as liabilities. However, there is no showing that this financial statement is unavailable. Nor is there any suggestion that either Mark Connally or Ben Barnes or the government will dispute that John Connally did not ever consider himself or his partnership with Ben Barnes liable on the Delta loans to Mark Connally. Indeed, the government represented at the hearing before the magistrate judge that "the people from Austin who were involved in this case were Ben Barnes and Mark Connally, not John Connally." There is no basis to assume, prior to trial, that the trial evidence will show otherwise. At this stage it is simply impossible to tell whether John Connally's absence would substantially prejudice the defense.

To the extent that Crouch may have lost any witnesses due to improper delay, he has not shown any resulting actual, substantial prejudice, and his claims of prejudice are essentially speculative and premature. As to lost documentation, Crouch's motion to dismiss admits that "the

Defendant cannot point to the loss of any significant documents at this time." And, there is no showing that any of the loan documents or closing papers are missing.[35]

Frye did not testify at the evidentiary hearing. Fry's former secretary, who came to work for him in March 1987, testified that in September 1990, when he moved to a smaller office she threw away all his office files (except accounting files). Frye had customarily made notes of telephone conversations and put them these files. She had never heard of Delta before Frye testified at the grand jury on November 1922.[36] She did not know whether or not the Frye office files thrown away in 1990 included any related to the transactions involved in the indictment. When asked if she knew whether Frye had any files at his house, she replied, "I don't think so, but I can't say yes or no." It appears that all the loan documents, including closing statements and records showing

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[35] While Crouch's briefs and argument suggest that minutes of loan committee meetings are missing, such is not established by the record. At the hearing, a documents custodian testified it would probably take a search of about two weeks duration to determine if those minutes could be located. Just what Crouch hoped to show by those minutes is unclear, and there is certainly nothing to suggest that Crouch will not be able to show that the minutes did not reflect nominee loans.

[36] On cross examination she said she was unaware that after March 1987 Frye was involved "in a countersuit" respecting a four million dollar loan at Delta. The record indicates that that matter was settled by the property Frye purchased (as alleged nominee for Ferguson) being conveyed back to Delta.

disbursements, are available, and Frye does not contend otherwise, except in two particulars.[37]

First, the loan documents include a Memorandum of Profit Participation Agreement, executed by Ferguson C & D, Inc. and Frye's J.M.G. Corporation in recordable form, reflecting that Ferguson C& D, Inc. had a profit participation in one of the Delta REO tracts Frye purchased, but not specifying the parties' respective percentages of profits.[38] Attorney Johnson testified that this document, and certain other of the loan documents pertaining to transactions between Frye and Ferguson (including a note and deed of trust, in which Johnson was named trustee, and a letter from Delta to Ferguson C & D, Inc.), appeared to have been prepared by him, as they bore his typed initials and their format and style were consistent with his usual drafting of such documents. Johnson at the time the loans closed was with the Phillips, King, Smith & Wright law firm, which he subsequently left in March 1989, and one of the closing statements shows that firm's fees were paid at closing by Frye. Johnson testified he had no recollection of any of the transactions or of being at the closing, had never met or known either Ferguson or Frye or Crouch, and did not know

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[37] Frye's motion to dismiss for preindictment delay also mentions five witnesses whom it asserts Frye is unable to locate, but does not allege what they could have testified to; the motion likewise alleges that Frye's attorney at the time of the transactions (one Higgs) is now unable to recall them. The motion is not verified and no evidence supporting any of those allegations was offered at the hearing before the magistrate judge.

[38] There is no evidence as to whether or not this Memorandum (or duplicate of it) was actually recorded.

whom he was representing in preparing the documents.[39] He stated that he does not now have any file on any of these transactions, and does not now recall whether he ever had such file. He never threw away any files pertaining to Frye, Ferguson or Delta. He had "no idea" whether the firm he was with at the time has any files on the transactions in question. Attorney King - who had represented Frye in the early stages of this prosecution and sat with him at the hearing before the magistrate judge was a partner in the same law firm with Johnson at the time of the transactions in question, but left the firm sometime before Johnson did. Johnson testified that "ordinarily" a Profit Participation Agreement, specifying the profit percentages of the parties, would accompany a Memorandum of Profit Participation Agreement, but he had no independent recollection of ever having prepared or seen a Profit Participation Agreement as referred to in the Memorandum.

Frye argues that he has been prejudiced because the Profit Participation Agreement itself has been lost, and it would indicate that he was not a mere nominee for Ferguson. There are several answers to this. In the first place, there is no direct evidence that such an agreement ever existed; certainly there is no testimony that it did. Conversely, there is nothing to indicate that the government will take the position that there was no such agreement, or that Ferguson will not admit that such an agreement existed (or that Ferguson or Frye himself cannot testify to the essential terms of the agreement). Indeed, there is no evidence that such an agreement, if it ever existed, cannot be produced at trial. There is no evidence that Ferguson does not have the agreement - or, indeed, that Frye does not - or that any effort

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[39] That Frye apparently paid his fee did not necessarily mean he was representing Fry. Johnson did not know whether his then firm had ever represented Frye.

had been made to search the files of the law firm Johnson was with at the time of the transactions.[40] Finally, there is nothing to suggest that the agreement itself would be substantially more helpful to Frye than the Memorandum. The crux of the point Frye seeks to make - that he retained a continuing interest in the property with Ferguson - is made by the Memorandum itself. At this stage, Frye's claim of prejudice respecting the alleged Profit Participation Agreement is essentially speculative.

Frye's second claim of prejudice relates to the original of a "waiver of notice of special meeting of directors" of Frye's J.M.G. Financial Corporation that was submitted in connection with the application to Delta for the $3,950,000 loan to Frye and J.M.G. to purchase Delta REO. The government had apparently been unable to locate the original of the waiver of notice, but had a Xerox copy of it as purportedly signed by attorney Dunn. It also appears that Dunn had informed the authorities that he had not signed the document and that his purported signature on it was not in fact his. Frye asserts that the loss of the original is prejudicial because handwriting analysis cannot be performed on a copy to show that Frye did not forge Dunn's signature.[41]

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[40] While Johnson's testimony suggests that the firm had dissolved not long after he left in March 1989, he also stated that he knew "they stored some files off campus."

[41] This contention is entirely based on FBI Agent Kettler's testimony as follows:

> "Q" [Frye's counsel] All right. Tell me whether or not you have ever presented this document to the FBI for a handwriting analysis to determine whether Mike Frye was or was not the author of

This is assertedly relevant to count 18, which charges Crouch and Frye with false statements to Delta in connection with its $3,950,000 loan to Frye, contrary to section 1014, because

> "[t]he [loan] application and corporate minutes were materially false in that they purport to represent the intent of the defendant Michael J. Frye that he and his corporation be held liable for repayment of the debt, when the defendants [Crouch and Frye] then and there well knew that defendant Michael J. Frye was a mere nominee borrower who believed himself and his company to have no actual liability on the note.

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[41](...continued)
this thing that purports to say Abe Dunn.

A. No, we haven't.

Q. And tell the Court why you haven't.

A. It's a copy.

Q. And you can't do a handwriting analysis not from a copy?

A. Not very well."

In response to Frye's counsel's further suggestion that "we can't even submit it for a handwriting analysis," Kettler responded:

> A. I'm not saying that. There may be some handwriting analyses people that will work with copies, but our people in our laboratory prefer originals.
>
> Q. And in fact, they won't work with copies; right?
>
> A. I don't know. I doubt it, but I don't know for sure. I don't think they would."

There was no evidence that any handwriting expert had ever examined the copy or opined that no handwriting analysis could be based on it.

> Additionally, the corporate minutes were false in that no such director's meeting was actually held."[42]

Again, Frye's claims of prejudice in this connection are at this stage speculative at best to begin with, there is simply no sufficient showing that a handwriting analysis could not be performed and indeed none had even been attempted (see note 41, *supra*). Moreover, there is absolutely nothing to indicate that the government will make any attempt to prove that Frye forged Dunn's signature, or even that Dunn's purported signature was not his. Indeed, evidence that Dunn's signature on the notice was false is neither necessary nor sufficient to prove that "no such directors' meeting actually was held" as alleged in count 18. Finally, proof that no directors' meeting was held is wholly unnecessary to conviction on Count 18, which in substance rests on the completely unrelated "nominee" allegation, as does the government's entire theory of the case. We note in this connection that the government has never taken the position that the loan papers were not adequately worded and signed so as to bind Frye *personally*, or that they were not adequate to bind his corporation, whether or not the directors' meeting in question actually occurred. And, Frye has pending in the district court a motion to strike the count 18 directors' meeting allegation on the grounds that it is immaterial, and ruling thereon has been postponed until trial.[43] Even if there

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[42] Count 18 also alleged that the purpose of this "nominee loan" was "to avoid loans to one borrower limitations." As previously indicated, the government's theory of the case was that the real borrower, for whom Frye was nominee, was Ferguson.

[43] Frye's motion points out that the failure of the board to approve "could not, as a matter of law, have been

were potential prejudice to Frye in this connection, it could be entirely obviated by striking from count 18 the allegation as to the directors' meeting - which would leave the plainly main thrust of that count wholly intact - and/or by excluding proof as the verity of Dun's signature on the notice. Dismissing the entire indictment prior to trial is plainly uncalled for.

Frye's other assertions of prejudice are equally unavailing.[44]

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[43](...continued)
raised as a defense by the borrower corporation," citing Texas Business Corporation Act Art. 2.04(B). The government has never disputed this, and has only argued that ruling should be deferred to trial.

[44] With respect to Frye's possible loss of notes of telephone conversations, Frye has referred to a memorandum by FHLB examiner Mims of a conversation (whether by telephone is not clear) with Frye on July 23, 1986. However, before the magistrate Judge, Frye's counsel took the position that this memorandum did not incriminate Frye, stating ". . .it nowhere says that Mike Frye was a nominee. It does not say that Crouch and Ferguson put the whole deal together and he [Frye] didn't even have to go to Delta to sign the loan papers, which is all true." We have no assurance that Mims will testify as to what was said in this conversation in any manner inconsistent with this characterization of it by Frye's counsel.

Frye also introduced testimony by attorney Knoblock, who wrote letters in June 1986, purportedly on behalf of J.M.G. Financial to Ferguson and Crouch. The letters were on the letterhead of another attorney with whom Knoblock officed. Knoblock, on being shown the letters, said

Neither Frye no Crouch has discharged the burden, especially heavy prior to trial, of showing that at trial they almost certainly will suffer substantial actual prejudice by reason of the claimed undue delay in the return of the indictment. No more than potential, speculative prejudice is shown. To the extent that the district court found otherwise, its findings are not supported by the record and are clearly erroneous. While events at trial may demonstrate actual and substantial prejudice, at present Frye's and Crouch's claims are premature.

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[44](...continued)
he recognized the signature as his. He stated that he had represented J.M.G. "just for a brief period of time in 1986." He came to do so at the request of one Dan Croft a self-employed mortgage broker. He wrote the letters following a meeting with Croft and an attorney Knoblock did not know, who purported to represent Ferguson, "and some other individual was representing J.M.G., I don't recall the name." He things Croft told him to write the letters. It must *not* have been Frye, because Knoblock testified he did not know Frye and had never met or seen him prior to testifying at the hearing before the magistrate judge. He did not know Crouch or who he was. He had met Ferguson. The letter to Crouch, at Crouch's law firm, concerned the Delta $3,950,000 loan to J.M.G. and states, "It was the understanding and information of JMG that this transaction was to facilitate a sale from Delta to an undisclosed purchaser, being Mr. R. B. Ferguson." Knoblock disposed of all his J.M.G. Files in 1991. However, there is no evidence as to what those files might have contained. Knoblock did testify that he could not say he ever saw a file containing those letters. This testimony does not establish Prejudice to Frye. It rather suggests that the government may have a difficult time tying Frye to the letters. How this will play out a trial cannot now be reliably ascertained.

CONCLUSION

We summarize our holdings.

We reject the *Townley* balancing test and hold that where an indictment is returned within the statute of limitations, preindictment delay does not violate due process unless that delay, in addition to prejudicing the accused, was intentionally brought about by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other bad faith purpose. The district court having declined to make any such finding of bad faith,[45] accordingly erred in granting the motion to dismiss the indictment for preindictment delay.

We further hold that preindictment delay does not entitle the accused to dismissal of the indictment on due process grounds unless he demonstrates that the improper delay caused actual, substantial prejudice to his defense. The requisite prejudice may not be presumed, rebuttably or otherwise, merely from the length of the delay, and the district court erred in holding to the contrary and in partially relying on presumed prejudice. Moreover, because actual, substantial prejudice to the defense *at trial* is required a showing of a mere potential or possible trial prejudice does not suffice. This means that dismissal on such a basis *prior to trial* will rarely (if ever) be appropriate. In all but the clearest and most indisputable cases, the district court, even though inclined to grant such a motion, should nevertheless normally withhold doing so until after verdict, when the

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[45] As noted, the district court correctly recognized that the record "will not justify" any such finding of bad faith. However, because of discovery and evidentiary limitations imposed by the magistrate judge, the district court declined to rule out governmental bad faith.

assessment of actual, substantial trial prejudice can more accurately be made. Here the evidence is wholly insufficient to sustain a finding that Crouch and Frye *will* - not merely likely may - suffer actual and substantial prejudice to their defense *at trial.* to the extent the district court found to the contrary, its findings are clearly erroneous. "Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." *Marion* at 326, 92 S.Ct. at 466.

We accordingly reverse the district court's order dismissing the indictment and remand for further proceedings consistent herewith.[46]

REVERSED and REMANDED

POLITZ, Chief Judge, with whom BENAVIDES, Circuit Judge, joins dissenting;

Today the majority holds that the due process clause of the fifth amendment does not require dismissal of an indictment for pre-indictment delay unless that delay was "intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the

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[46] The district court shall not grant the motion to dismiss unless and until the events of trial demonstrate, and the court finds, actual and substantial trial prejudice to the defense as the result of improper and undue delay and also finds, on the basis of adequate additional evidence, that the delay was intentionally brought about by the government for the purpose of gaining some tactical advantage over the defendants or for some other bad faith purpose.

contemplated prosecution or for some other impermissible, bad faith purpose."[1] I must respectfully dissent.

The Supreme Court has never held that bad faith is a requisite to the sustaining of a challenge to an indictment based on pre-indictment delay. Although both *United States v. Marion*[2] and *United States v. Lovasco*[3] refer to prosecutorial bad faith, neither case holds that proof of such is required.[4] The Court merely acknowledges the government's concessions that intentional conduct would violate the due process clause if actual prejudice had been shown.[5]

I view the majority's insistence on a bright-line rule requiring prosecutorial bad faith as contrary to both *Lovasco* and *Marion* which teach that the administration of justice, in the context of a defendant's right to a fair trial, necessitates a case-by-case faith as contrary to both *Lovasco* and *Marion*

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[1] Slip opinion at 3872.

[2] 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

[3] 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

[4] *See United States v. Moran*, 759 F.2d 777 (9th Cir. 1985), *cert. denied*, 474 U.S. 1102, 106 S.Ct. 885, 88 L.Ed.2d 920 (1986); *Howell v. Barker*, 904 F.2d 889 (4th Cir.), *cert. denied*, 498 U.S. 1016, 111 S.Ct. 590, 112 L.Ed.2d 595 (1990).

[5] *See Moran. See also Lovasco*, 431 U.S. at 796 n. 17, 97 S.Ct. at 2051 n. 17 ("In *Marion* we noted with approval that the government conceded that a 'tactical' delay would violate the Due Process Clause. The Government renews that concession here. . . .")

which teach that the administration of justice, in the context of a defendant's right to a fair trial, necessitates a case-by-case inquiry.[6] *Lovasco* clearly articulated our task. We "must consider the reasons for the delay as well as the prejudice to the accused."[7] In undertaking this analysis we should balance the actual prejudice to the defendant against the reasons for the delay in our determination whether the delay violates those fundamental concepts of justice which are inherent in our civil and political institutions and which define the community's sense of fair play and decency.[8] This approach fairly accords consideration to the competing

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[6] *Howell.* In *Lovasco* the Court stated:

> In *Marion* we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay.[] We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases. We simply hold that in this case the lower courts erred in dismissing the indictment. *Id.* at 796-97, 97 S.Ct. at 2052 (citations and footnote omitted).

[7] *Lovasco*, 431 U.S. at 790, 97 S.Ct. at 2049.

[8] *Howell* (citing *Lovasco*).

interests of the government and defendant;[9] if the only negligent, reckless, or slothful conduct by the government is placed on the scale then the prejudice suffered by the defendant will have to be greater than in cases where intentional government conduct obtains, and vice versa.[10]

Even if a black-letter rule were warranted, in my judgment the majority errs in requiring intentional conduct. In *Lovasco* the Court referred with approval to the government's concession that recklessness may support a due process violating stating:

> In *Marion* we noted with approval that the Government conceded that a "tactical" delay would violate the Due Process Clause. The Government renews that concession here and expands it somewhat by stating: "A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense."[11]

Today's decision directs that despite the severity of the prejudice to the defendant and ignoring the length of the pre-indictment delay, if a defendant cannot prove improper prosecutorial motive, no due process violation may occur.

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[9] The majority expresses concern about the difficulty in balancing the reasons for the delay against the prejudice. While this may be difficult, federal judges are required to undertake similar inquiries on a daily basis.

[10] *Moran.*

[11] 431 U.S. at n. 17, 97 S.Ct. at n. 17 (citations omitted).

This is, to me, a smothering of fundamental concepts of justice and the community's sense of fair play. I would balance the actual prejudice as found the district court against the government's assigned reasons for the delay and, in that setting, determine whether there has been a due process violation[12]

In the case at bar the district court's finding of actual prejudice was not clearly erroneous and the government's reasons for inaction, fairly viewed, do not justify or warrant the inordinate delay.[13] I perceive a due process violation and would affirm the dismissal of the indictment.[14]

I respectfully dissent.

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[12] *See, e.g., United States V. Townley*, 665 F.2d 579 (5th Cir.), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982); *United States v. Miller*, 20 F.3d 926 (8th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 226, 130 L.Ed.2d 152 (1994); *Howell; Moran.*

[13] *United States v. Crouch*, 51 F.3d 480 (5th Cir. 1995)(Panel Opinion).

[14] I also reject the majority's strong admonition that an indictment should not be dismissed pretrial. In addition to the economic and other costs associated with an unnecessary trial, additional interests are imperiled. It is not merely fanciful to envision meritorious defenses, including constitutional claims, which might go begging for fear of a more harsh punishment if the matter proceeds to verdict. Our system of justice does not gain thereby.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellant,

v.

A Guy CROUCH, III and Michael J. Frye, Defendants-Appellees.

No. 93-7719

United States Court of Appeals,
Fifth Circuit.

April 20, 1995

Bank fraud defendants moved to dismiss on ground of undue preindictment delay. The United States District Court for the Southern District of Texas, 835 F.Supp. 938, Samuel B. Kent, J., dismissed indictment, and United States appealed. The Court of Appeals, Politz, Chief Judge, held that indictment brought eight years after allegedly illegal banking trans-actions, and six and one-half years after criminal referrals had issued, resulted in actual prejudice, necessitating dismissal despite lack of any bad faith by govern-ment.

Affirmed.

Garwood, Circuit Judge, dissented and filed opinion.

1. Courts — 900(2)

Court of Appeals is bound to follow earlier dispositive articulation of rule, as decision of one panel may not overrule decision, right or wrong, of prior panel in absence of en banc reconsideration or superseding decision of Supreme Court.

2. Indictment and Information — 42

Bank fraud indictment brought eight years after allegedly illegal banking transactions, and six and one-half years after criminal referrals had issued, resulted in actual prejudice, necessi-tating dismissal despite lack of any bad faith by government; crucial defense test-imony had been lost due to deaths of wit-nesses, and critical exculpatory documents were missing. U.S.C.A. Const. Amend. 5.

Appeal from the United States District Court For the Southern District of Texas.

Before POLITZ, Chief Judge, GARWOOD and BENAVIDES, Circuit Judges.

POLITZ, Chief Judge:

The district court dismissed indict-ments against A. Guy Crouch, III and Michael J. Frye which arose out of alleged illegal banking activity. For the reasons assigned we affirm.

Background

In March of 1986, while examining the records of Delta Savings Association of Texas, a failed institution, federal investigators discovered that the institution had been engaged in a "cash for trash" scheme.[1] Delta officials

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[1] Delta made loans to real estate investors conditioned on their purchase of property acquired by Delta primarily through prior defaults. The "sale" of this property reduced Delta's liabilities, lowered its required cash reserves, and

violated federal regulations which prohibited excessive loans to one borrower by using bogus nominee borrowers who bore no personal liability for the loans contracted.

Criminal referrals issued for Carl Gerjes, Delta's president, Robert Ferguson, an involved real estate investor, Crouch, Delta's attorney and chairman of its board of directors, and Frye who allegedly acted through a corporate alter ego, JMG Financial, as a nominee borrower for Ferguson. In 1986 the government began an investigation into Delta's activities, focusing on Gerjes and Ferguson, leading to the conviction of Gerjes in 1989 and his guilty plea conviction on separate but related offenses in 1992, as well as Ferguson's conviction in 1992. On November 12, 1992 a 19-count indictment was handed up against Crouch and Frye, charging misapplication of funds, 18 U.S.C. §§ 2, 657; False entries, 18 U.S.C. §§ 2,1006; false statements, 18 U.S.C. §§ 2, 1014; and bank fraud, 18 U.S.C. §§ 2, 1344.

Citing the eight-plus years between the alleged crimes in 1984-85 and the indictment, Crouch and Frye asserted prejudice from the pre-indictment delay and moved for dismissal. A magistrate judge recommended dismissal because of both presumptive and actual prejudice caused by the passage of time. Following a *de novo* review the district court adopted the recommendation, holding that defendants had suffered presumptive prejudice because of the delay and finding actual prejudice resulting from the delay due to the unavailability of testimony because of death and memory loss and the disappearance of exculpatory records. Applying the balancing test directed in *United States v. Brand*[2] and in

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artificially increased its net worth, thereby evading closer inquiry into it operations.

United States v. Townley[3] for claimed violations of due process resulting from preindict-ment delay, the court found that the government's assigned reason for delay, the lack of resources, did not outweigh the prejudice suffered by Crouch and Frye. The court dismissed the indictment; the government timely appealed.

Analysis

The government faults the district court's use of the *Brand/Townley* balancing test. Even assuming Crouch and Frye were able to show prejudice, the government contends that their inability to demon-strate prosecutorial bad faith for the dilatory indictment defeated their motion for dismissal. It cites post-*Townley* decisions for the proposition that to establish a due process violation based on preindictment delay a defendant must show that the prosecutor intentionally delayed the indictment to gain tactical advantage.[4]

In *United States v. Marion*[5] the Supreme Court held that although the primary protection against undue delay prior to arrest, indictment, or inform-ation is the appropriate statute

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[2] 556 F.2d 1312 (5th Cir. 1977), *cert denied*, 434 U.S. 1063, 98 S.Ct. 1237, 55 L.Ed.2d 763 (1978).

[3] 665 F.2d 579 (5th Cir.), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982).

[4] *See United States v. Byrd*, 31 F.3d 1329 (5th Cir. 1994); *United States v. Neal*, 27 F.3d 1035 (5th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 1165, 130 L.Ed.2d 1120 (1995; and *United States v. Amuny*, 767 F.2d 1113 (5th Cir. 1985).

[5] 404 U.S. 307, 92 S.C.t 455, 30 L.Ed.2d 468 (1971).

of limitations, the due process clause of the fifth amendment offers some protection from prejudice to a defendant's case arising from this delay. The Court accepted, as an example, the government's contention that if it be shown that the government had created the prejudicial delay as "an intentional device to gain tactical advantage over the accused,"[6] due process would require the automatic dismissal of the indictment.

Following *Marion* we began the development of a test for violations of due process in this context. Despite the *Marion* Court's express refusal to "determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution."[7] in *dicta* we used the statement that a showing of prosecutorial bad faith required automatic dismissal for the very different proposition that such a showing was a *sine qua non* for the finding of a due process violation.[8] Because the defendants

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[6] 404 U.S. at 322, 92 S.Ct. at 464.

[7] *Id.*

[8] *See, e.g., United States v. Avalos*, 541 F.2d 1100 (5th Cir. 1976), *cert. denied*, 430 U.S. 970, 97 S.Ct. 1656, 52 L.Ed.2d 363 (1977); *United States v. Butts*, 534 F.2d 975 (5th Cir. 1975).

Avalos, however noted a *caveat* to use of a standard requiring a showing of prosecutorial bad faith, stating:

> There is no Supreme Court authority squarely holding that satisfaction of both elements of the test is necessary to find a due process violation [and] there remains substantial doubt whether, in a case in which actual pre-accusation prejudice was overwhelming, the government's purposeful delay would have to be

in those cases were unable to make a showing of prejudice due to delay, we did not apply this statement in a dispositive ruling.

The Supreme Court next considered this issue in *United States v. Lovasco*,[9] stating that proof of prejudice was "a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused,"[10] including the inquiry whether the delayed prosecution violates "elementary standards of air play and decency"[11] and "fundamental conceptions of justice which lie at the base of our civil and political institutions."[12] After balancing the prejudice caused by an 18-month delay against the government's reason for delay - its continuing investigation - the *Lovasco* Court upheld dismissal of the indictment.

The *Lovasco* Court also noted that following *Marion* neither it nor any lower appellate court had "had a sustained opportunity to consider the constitutional significance of various reasons for delay."[13] Instead of passing upon this

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shown; or, alternatively, where the government's misconduct was blatant, whether the defendant would still bear the burden of showing actual prejudice.

541 F.2d at 1107 n.9.

[9] 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

[10] *Id.* at 790, 97 S.Ct. at 2048.

[11] *Id.* at 795, 97 S.Ct. at 2051.

[12] *Id.* at 790, 97 S.Ct. at 2048 (citations omitted).

[13] *Id.* at 797, 97 S.Ct. at 2052.

issue, the Court opted to leave such rulings to future decisions of the lower courts applying "the [aforementioned] settled principles of due process."[14]

In *Brand*, one of our first cases applying the teaching of *Lovasco*, after noting that actual prejudice must be shown as a threshold matter, we stated that *Lovasco* did "not indicate that governmental interests not amounting to an intentional tactical delay will automatically justify"[15] such prejudice. Rather, we concluded that *Lovasco* stood for balancing the government's need for the delay against the actual prejudice suffered by the defendant.

[1] We next addressed the issue in *Townley* and crystallized the test for due process violations thusly:

> [T]he accused bears the burden of proving the prejudice and, if the threshold requirement of actual prejudice is not met, the inquiry ends there. Once actual prejudice is shown, it is necessary to engage in a sensitive balancing of the government's need for an investigative delay against the prejudice asserted by the defendant. The inquiry turns on whether the prosecution's actions violated fundamental conceptions of justice or the community's sense of fair play and decency. Inherent in the adoption of a balancing process is the notion that particular reasons are to be weighed against the particular prejudice suffered on a case-by-case basis. . . .*[D]ue process* . . . *tu*rns upon whether the degree of prejudice thereby sustained by

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[14] *Id.*

[15] 556 F.2d at 1317 n. 7.

> the accused is sufficiently balanced by the good-faith reasons advanced by the government.[16]

The *Townley* court left no doubt that a showing of bad faith by the government was not a requisite for a due process violation. We noted:

> [T]he *Lovasco* balancing test would be reduced to mere words if indeed the government's 41-month delay in bringing the indictment were excusable, whatever the prejudice caused the defendant, simply by a showing that the government was negligent, however grossly, and not bad-intentioned.[17]

Several subsequent decisions overlooked *Townley's* holding and relied on the *dicta* from pre-*Lovasco* cases for stating that preindictment delay may result in dismissal of an indictment only when the delay resulted from an ill-intentioned act by the government.[18] In accordance with our long-established rule, we are bound to follow the earlier dispositive articulation of a rule as the decision of one "panel may not overrule the decision, right or wrong, of a prior panel in the absence of *en banc* reconsideration or superseding decision of the Supreme Court."[19] We therefore

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[16] 665 F.2d at 582 (citations omitted) (emphasis added).

[17] *Id.*

[18] *United States v. Wehling*, 676 F.2d 1053 (5th Cir. 1982). *See also, e.g., Amuny; Byrd; Neal;* and *United States v. Beszborn*, 21 F.3d 62 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 330, 130 L.Ed.2d 288 (1994).

[19] *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86, 89 (5th Cir. 19922), *cert. denied*, ___ U.S. ___ 113 S.Ct. 1028, 122

must apply the *Brand/Townley*, balancing test as the binding precedent. the district court correctly relied upon the holdings of *Brand* and *Townley* in its evaluation of the merits of defendants' motion to dismiss.

[2] We find merit in one part of the government's challenge to the district court's ruling, specifically its holding that passage of approximately eight years from the alleged commission of the crimes to the issuance of the indictment was presumptively prejudicial. As authority the trial court cited *Doggett v. United States*,[20] which involved *post*-indictment delay, as support for the existence of presumptive prejudice in this *pre*-indictment delay case. We find this reliance misplaced as "*pre*-indictment delay does not raise a Sixth Amendment issue, but is instead examined under the due process clause of the Fifth Amendment."[21]

Our precedents require that the triggering prejudice be actual, not presumptive. Twenty years ago we stated that

> when pre-indictment delay is asserted, *actual prejudice* and not merely the real possibility of prejudice inherent in any extended delay is a necessary element which must be shown before the restraints of the due process clause will be applied to bar a prosecution because of a delay.[22]

L.Ed.2d 173 (1993) (citations omitted).

[20] ___ U.S. ___ 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992).

[21] *Byrd*, 31 F.3d at 1339 (emphasis in original); *Marion*.

[22] *United States v. McGough*, 510 F.2d 598, 604 (5th Cir. 1975) (emphasis added) (citations omitted). *Accord, Butts* at 977 ("The mere passage of time [does] not constitut[e] the

Townley and subsequent decisions[23] recognized that the defendant must show proof of actual prejudice as a threshold requirement. The district court's conclusion that there was presumptive prejudice from the mere passage of time was incorrect.

The court *a' quo* also based its decision, however, upon its finding of actual prejudice, focusing upon Crouch's loss of testimony due to the deaths of several potential witnesses, and upon Frye's claim that critical and exculpatory documentary evidence was missing. The government challenges this finding, contending that the defendants' claim of prejudice consists only of vague assertions of lost witnesses, faded memories, or misplaced documents.

Findings of actual prejudice are reviewed under the clear error standard.[24] We find no such error present. The record supports the finding of prejudice due to the above factors, reflecting that Crouch established exactly which witnesses were lost and how the lost witnesses were crucial to rebut the credibility and character of Gerjes and Ferguson,

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type of actual prejudice necessary to set aside an indictment returned within the appropriate statute of limitations. . . ."); *United States v. West*, 568 F.2d 365, 367 (5th Cir.), *cert. denied*, 436 U.S. 958, 98 S.Ct. 3073, 57 L.Ed.2d 1123 (1978) ("[I]t is readily inferable from the decisions of this court that the defendants generally bear the burden of establishing actual prejudice.").

[23] *Byrd; Neal; Beszborn; Amuny.*

[24] *Beszborn*, 21 F.3d at 66.

potentially the government's star witnesses.[25] These potential witnesses included his father, A. Guy Crouch, Jr., who, ws a former board president and major stockholder of Delta, would have testified in support of Crouch's claim that Gerjes had misled the board and other Delta officers about his unauthorized operations. Other corroborating witnesses included Tranquillo Gubert, another director, and Larry Tschearner, former vice president of an entity involved in the scheme, who would have testified about their dealings with Gerjes and Ferguson. As Gerjes and Ferguson likely would be cooperating with the government in its prosecution of Crouch and Frye, the lost testimony would also be crucial for rebuttal and impeachment purposes.

The record also contains references to lost exculpatory documentary evidence, including a lost "Profit Participation Agreement" between Frye and Ferguson's corporations that allegedly would have shown Frye's intent to work with Ferguson in developing the land purchased, rebutting claims that Frye was not materially involved with the loan and land purchase. Further, the authenticity of a copy of a document constituting evidence of an overt act of the conspiracy poses a material issue. The government claims that Frye forged signatures to a waiver of notice form that allegedly facilitated his purchase of the "trash" real estate. The record establishes that only an original copy can be examined for authenticity and, as the original cannot be found,there is now no method by which Frye can show that the signatures on the waiver are authentic. The record also reflects that both Frye and Crouch had lost, either through routine disposal or surrender to

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[25] Further, the record indicates that because of Crouch's cooperation against Gerjes, there is the likelihood of the latter's animosity.

authorities,[26] personal records that could have assisted in rebutting proof of their guilt. Some of these lost documents were irreplaceable; this fact, when combined with both expert evidence validating the defendants' claim of memory loss and the aforementioned lost exculpatory testimony, amply supports the court's finding that Crouch and Frye suffered significant actual prejudice.

Consistent with *Townley's* holding, after finding actual prejudice from pre-indictment delay, the court must weigh the actual prejudice suffered against the reasons for the delay. The record reflects that the government had knowledge of Crouch's and Frye's involvement dating, at the very latest from its August 1986 receipt of the criminal referrals, but did not initiate an investigation until, at the very earliest, May of 1991. The reasons for the long delay in launching the investigation were, essentially, lack of manpower and the low priority which this investigation was assigned. Although "prosecutorial overload and insufficient personnel[] might be entitled to slight weight in the balance of due process considerations,"[27] this slight weight is insufficient to outweigh the actual prejudice to Crouch and Frye caused by the lengthy pre-indictment delay.[28] Under the circumstances presented by this particular case, we conclude that requiring Crouch and

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[26] Crouch bases his failure to retain records in part upon his receipt, on at least three separate occasions, of assurances from the government that he was not a target of any investigation.

[27] 665 F.2d at 586.

[28] Although the actual delay was longer (by about 18 months), the period of the investigation is not considered. *See Lovasco, supra.*

Frye to stand trial now would be fundamentally unfair and violative of due process.

The judgment of the district court dismissing the indictment is AFFIRMED.

GARWOOD, Circuit Judge, dissenting:

I respectfully dissent.

My first concern is that the majority departs from the overwhelming weight of precedent in this Circuit by holding that, where limitations have not run, a defendant may nevertheless prevail on a due process claim of pre-indictment delay even though the government did not intentionally delay the indictment to gain tactical advantage or for other impermissible purpose, and the delay arose only because of the lack of manpower and the low priority assigned to the investigation. As less than exhaustive review of this Court's published opinions since *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), reflects that at least twenty-nine different judges of this Court - twenty-five of the thirty-two individuals who have ever served as an active or senior judge of this Court since it split October 1, 1981 - have authorized, or joined without reservation, unanimous opinions in some eighteen different cases holding or stating in substance that "[t]o prove that pre-indictment delay violated his due process rights a defendant must demonstrate that the prosecutor intentionally delayed the indictment to gain a tactical advantage *and* that the defendant incurred substantial prejudice as a result of the delay." *United States v. Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994).[1]

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[1] Other post-*Lovasco* published opinions of this Court so holding or stating include: *United States v. Neal*, 27 F.3d 1035, 1041 (5th Cir. 1994) *cert. denied*, _____ U.S. _____,

Citing our acknowledge rule that "one panel may not overrule the decision, right or wrong, of a prior panel in the absence of *en banc* reconsideration or superseding decision of the Supreme Court,"[2] the majority justifies its departure from the foregoing mass of Fifth Circuit precedent by reliance on *United States v. Brand*, 556 F.2d 1312 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063, 98 S.Ct. 1237, 55 L.Ed.2d 763 (1978),

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115 S.Ct. 1165, 130 L.Ed.2d 1120 (1995); *United States v. Beszborn*, 21 F.3d 62, 65-66 (5th Cir.), *cert. denied*, ____ U.S.____, 115 S.Ct. 330, 130 L.Ed.2d 288 (1994); *United States v. Hooten*, 933 F.2d 293, 296 (5th Cir. 1991); *Dickerson v. Guste*, 932 F.2d 1142, 1144 (5th Cir.), *cert. denied*, 502 U.S. 875, 112 S.Ct. 214, 116 L.Ed.2d 172 (1991); *United States v. Delario*, 192 F.2d 766, 769 (5th Cir. 1990); *United States v. Varca*, 896 F.2d 900, 904 (5th Cir.), *cert. denied*, 498 U.S. 878, 111 S.Ct. 209, 112 L.Ed.2d 170 (1990); *United States v. Carlock*, 806 F.2d 535, 549 (5th Cir. 1986), *cert. denied*, 480 U.S. 949, 107 S.Ct. 1611, 94 L.Ed.2d 796 (1987); *United States v. Johnson*, 802 F.2d 833, 835, 836 (5th Cir. 1986); *United States v. Scott*, 795 F.2d 1245, 1249 (5th Cir. 1986); *United States v. Ballard*, 779 F.2d 287, 293 (5th Cir.), *cert. denied*, 475 U.S. 1109, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986); *United States v. Amuny*, 767 F.2d 1113, 1119, 1120 (5th Cir. 1985); *United States v. Wehling*, 676 F.2d 1053, 1059 (5th Cir. 1982); *United States v. Hendricks*, 661 F.2d 38, 39-40 (5th Cir. 1981); *United States v. Nixon*, 634 F.2d 306, 310 (5th Cir. 1981); *United States v. Durnin*, 632 F.2d 1297, 1299-1300 (5th Cir. 1980); *United States v. Ramos*, 586 F.2d 1078, 1079 (5th Cir. 1978); *United States v. Willis*, 583 F.2d 203, 207 (5th Cir. 1978).

[2] *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86, 89 (5th Cir. 19922), *cert. denied*, ___ U.S. ___ 113 S.Ct. 1028, 122 L.Ed.2d 173 (1993) (citations omitted).

and *United States v. Townley*, 665 F.2d 579 (5th Cir.), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982). Laying aside the thought that we may have had the functional equivalent of *en banc* establishment of the rule most recently stated and applied in *Byrd*, it is in any event clear to me that *Brand* and *Townley* cannot bear the weight assigned them.

As to *Brand*, its statements that intentional delay for tactical advantage need not be shown and that instead the reasons for the delay should be balanced against the resulting prejudice, 556 F.2d at 1317 n. 7, are plain dicta.[3] *Brand* rejected the defendant's pre-indictment delay claim because he had not demonstrated any prejudice - an admitted requirement for relief irrespective of the reasons for the delay. *Id.* at 1316-1317. At the end of the prejudice discussion in the text - which never even adverts to whether a further showing beyond prejudice is required - footnote 7 is called for. It is only in this footnote that the language relied on by the majority appears. However, by this stage the *Brand* court had already determined to deny relief because of the absence of prejudice. Moreover, nothing in footnote 7 of *Brand* - or in its text - identifies the reason for the delay or purports to characterize the reason as either being or not being intentional for tactical advantage, or negligence, or otherwise improper or insufficient. Nor does anything in *Brand* - in its text or its footnotes - purport to balance the reason for the delay against the prejudice to the defendant

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[3] As the majority inferentially recognizes, dicta by one panel does not bind a subsequent panel. *See Matter of Dyke*, 943 F.2d 1435, 1445 & n. 28 (5th Cir. 1991); *Nicor Supply Ships Associates v. General Motors*, 876 F.2d 501, 506 (5th Cir. 1989). As a practical matter, such principle is necessary to the effective functioning of a large multi-panel court such as the Fifth Circuit.

(which, of course, it could not, as it had already concluded there was no prejudice). *Brand* did not *apply* a balancing test, and the affirmance in *Brand* cannot be said to rest, even alternatively, on its general statement in footnote 7 that a defendant need not show intentional tactical delay by the prosecution. Thus, *Brand's* footnote 7 forms no part of its *ratio decidendi*, and is purely dicta.

Townley - a quorum decision by two judges - may well be a holding rather than simply dicta. In *Townley* we concluded that there was no evidence that the delay was due to "bad faith motive to prejudice" the defendant. 665 F.2d at 581. Under the rational of *Byrd* and its predecessors, that alone would have justified affirmance, even though we concluded that "the lengthy pre-indictment delay somewhat prejudiced Townley.." *Id.* at 586. However, we proceeded to actually balance the extent of the prejudice against the reasons for the delay, stating that such a balancing could show a due process violation from pre-indictment delay even though there was no "intentional tactical delay or harassment on the part of the government." *Id.* at 582. We ultimately concluded that the way the trial actually unfolded, and particularly the way the government sought to prove its case, was such that the prejudice to Townley was not sufficiently substantial when balanced against the reasons for the delay ("the press of other investigations . . . low-priority accorded to the present investigations and . . . changes of governmental prosecuting personnel," *id.* at 581), as to amount to a denial of due process.[4]

Assuming, then that *Townley* is holding, not dicta, it is nevertheless not binding because it conflicts with our

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[4] As discussed in the text below, it is also significant that in Townley we reviewed (and affirmed) a conviction following trial, while here we review a *pre*-trial dismissal.

earlier holding in *United States V. Durnin*, 632 F.2d 1297 (5th Circ. 1980). In *Durnin*, we rejected a due process claim of pre-indictment delay on the *sole* basis that the defendant had not shown a motive on the part of the prosecutor to use the delay for tactical advantage, and we did so without even evaluating the presence or extent of prejudice:

> "Appellant alleges that the delay denied him due process because he lost the testimony of an important witness in the interim between when the government could have brought an indictment and when it finally chose to do so. However, to establish a violation of the Due Process Clause in this context appellant *must show, not only* substantial prejudice flowing from an inordinate delay, *but also a motive on the part of the prosecutor to use the delay to gain a tactical advantage* . . . [citing *Lovasco, Marion,* and *Willis*]. Appellant does not contend that the government sought to delay his indictment for tactical advantage and the district court specifically found that the delay resulted from the government's good-faith attempt to ascertain appellant's guilt beyond a reasonable doubt. Trial Transcript, vol. 3, at 78. Since this finding is abundantly supported by the record, the district court's ruling on the motion to dismiss must be affirmed." *Id.* at 1299-1300 (citations and footnote omitted; emphasis added).

There is no reasonable basis upon which *Townley* can be characterized as holding while at the same time treating *Durnin* as dicta. *Durnin* is thus the controlling precedent. The overwhelming weight of authority in this Circuit is to the same effect. *See* note 1, *supra*, and accompanying text.

Accordingly, I am unable to agree to the majority's application of a contrary rule.[5]

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[5] I note in passing that the Fifth Circuit does not stand alone in its holdings that to sustain a due process claim of pre-indictment delay the defendant must show "not only substantial prejudice. . . but also a motive on the part of the prosecutor to use the delay to gain a tactical advantage." *Durnin* at 1299. I *United States v. Sowa*, 34 F.3d 447, 450 (7th Cir. 1994), the Seventh Circuit stated.

> "To establish that a pre-indictment delay violated due process, [defendant] Sowa must prove that the delay caused actual and substantial prejudice to his fair trial rights, and there must be a showing that the government delayed indictment to gain a tactical advantage or some other impermissible reason. . . Sowa's claim. . . fails to meet the requirements of the second prong. . . [D]ue process is only implicated if the government purposely delayed the indictment to take advantage, tactically, of the prejudice or otherwise acted in bad faith."

The second Circuit stated the same rule in *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), *cert. denied*, 484 U.S. 1035, 108 S.Ct. 742, 98 L.Ed.2d 777 (1988). In his dissent from the denial of *certiorari* in *Hoo*, Justice White observed that the First, Third, Tenth, and Eleventh Circuits, in addition to the Second, "have similarly required a showing of prosecutorial misconduct designed to obtain a tactical advantage over the defendant or to advance some other impermissible purpose in order to establish a due process violation." *Hoo v. United States*, 484 U.S. 1035, 108 S.Ct. 742, 98 L.Ed.2d 777 (1988) (White, J., dissenting from denial of *certiorari*). Justice White identified the Fourth and Ninth Circuits as applying a balancing test. *Id.*

My second concern is that here the entire indictment as to Crouch and Frye has been dismissed *prior* to trial. It seems to me that only the very clearest showing of virtually *certain* substantial *actual trial* prejudice should justify such a *pretrial* dismissal. In my view, this high standard of proof has not been met here.

I begin by noting that the right here asserted is the right to avoid an unfair conviction, not the right to be free of a trial which will likely be unfair. In *United States v. MacDonald*, 435 U.S. 850, 860, 98 S.Ct. 1547, 1553, 56 L.Ed.2d 18 (1978), the Supreme Court held that "[u]nlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not . . . encompass a 'right not to be tried' which must be upheld prior to trial if is to be enjoyed at all." The same conclusion applied, *a fortiori*. to due process claims of pre-indictment delay.[6] The Supreme Court further stated in *MacDonald*:

> "Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. . . . The essence of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. Normally, is *only* after trial that that claim may fairly

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[6] Even statutes of limitation have been held not to create a right not to be tried. *See United States v. Weiss*, 7 F.3d 1088 (2d Cir. 1993). Although pre-trial dismissals on limitations grounds are not uncommon, that is because the date of the offense appears on the face of the indictment and the question is a purely legal one; the reasons for the delay in indictment and whether it is prejudicial are generally irrelevant to the limitations issue.

be assessed." *Id.* at 858-59, 98 S.Ct. at 1552 (emphasis added).

Again, this fully applied to claims of preindictment delay. The denial of relief before trial in no way precludes the accused, if convicted, from successfully demonstrating that the undue and improper preindictment delay substantially and unfairly prejudiced his ability to avoid that result. Thus in *United States v. Marion*, 404 U.S. 307, 325, 92 S.Ct. 455, 466, 30 L.Ed.2d 468 (1971), the Supreme Court reversed the pretrial dismissal for preindictment delay, but observed that "[e]vents of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." *Id.* at 326, 92 S.Ct. at 466. *See also MacDonald* at 858-59, 92 S.Ct. at 1552 ("The denial of pretrial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial - when prejudice can better be gauged - would also be denied").

These realities, it seems to me, dictate the conclusion that a far stronger showing should be required to sustain a claim of due process pre-indictment delay prior to trial than would be required after trial and conviction. I believe that experience bears this out. So far as I am aware, there is only one reported federal appellate decision sustaining such a pretrial dismissal, a 1976 decision by a divided panel of the Eighth Circuit *United States v. Barket*, 530 F.2d 189 (8th Cir.

1976). There are *no* such decisions since *Lovasco*.[7] This silence speaks volumes.

Townley provides a compelling example of how a strong pretrial showing of substantial prejudice may ultimately dissolve in the unfolding of the actual trial itself. There, the defendant Townley and his partner Owens were charged with mail fraud in connection wit inducing persons to purchase and invest in nonexistent vending machines. *Townley* at 582. Townley claimed that due to preindictment delay he was unable to show that he had really believed the machines would be produced and be a valuable investment for the purchasers. We concluded that the requisite substantial prejudice would have been shown "had the thrust of the government's case" as presented at trial "been that Townley well knew that he and Owens could not deliver the machine sold or that the scheme could not be successful." *Id.* at 583. We found no such substantial prejudice, however, *because* "the main thrust of the government's case." as presented at trial, "concerned [particular] misrepresentations made by Townley in the sale of the machines." *Id.* Townley also claimed prejudice from being unable to adequately corroborate his testimony that as soon as he discovered Owens' fraud, he took action to protect the investors. We rejected this based on the approach taken by the government at trial:

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[7] Shortly after *Barket*, another divided panel of the Eighth Circuit again sustained the pre-trial dismissal of three counts of a four-count indictment on a due process, pre-indictment delay basis. *United States v. Lovasco*, 532 F.2d 59 (8th Cir. 1976). However, the Supreme Court reversed. *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

"insofar as counsel was unable to corroborate Townley's testimony that (after he had discovered Owens' fraud) he had informed the financing company not to approve any further applications for credit by investor-purchasers, the government expressly stated it would not dispute Townley's testimony, and neither by argument nor evidence did it attempt to cast doubt upon his creditable act by Townley or upon his two customer-witnesses whose testimony tended to corroborate him. The government further made full disclosure of its files to Townley's attorney to aid him in the preparation of the defense." *Id.* at 585-86 (citation omitted).[8]

Another instructive decision of ours in this respect is *United States v. McGough*, 510 F.2d 598 (5th Cir. 1975). There, we reversed a pretrial dismissal order based on a due process claim of pre-indictment delay. We described the claim as follows:

"McGough's assertion of actual prejudice to his defense is based primarily upon the death of some six potential defense witnesses. Some of these witnesses, McGough claimed, would have testified as to firsthand knowledge of several of the transactions which entered into the government's calculation of the amount understated; the testimony of others might impeach government witnesses . . . . [T]he government asserted at the hearings that it had expected two of them to be government witnesses, rather than witnesses for the defense." *Id.* at 604.

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[8] We even observed that the government did not use but "had available" a witness "who would have cast doubt on Townley's exculpatory testimony." *Id.* at 586.

Although we observed that we could "find no indication that the trial court weighed the contradictory *factual assertions* before stating that there was actual prejudice." *id.* at 604, we nevertheless did *not* remand for further findings in that respect, but rather ordered that "the case is remanded for a prompt trial." *Id.* at 605. In this respect we quoted *Marion*, at 325-27, 92 S.Ct. at 466: "Events of trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." *Id.* at 604-5. *See also, e.g., Robinson v. Whitley*, 2 F.3d 562, 571 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1197, 127 L.Ed.2d 546 (1994);[9] *United States v. Rice*, 550 F.2d 1364, 1369 (5th Cir.), *cert. denied*, 434 U.S. 954, 98 S.Ct. 478, 479, 54 L.Ed.2d 312 (1994).[10]

Evaluation of due process claim of pre-indictment delay after trial not only benefits from sure knowledge of how (to say nothing of whether) the government proved its

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[9] In *Robinson*, the habeas petitioner claimed that the post-indictment delay caused him to lose two witnesses, one having died and the other no longer locatable, who "would have corroborated the 'alibi' he presented at trial." We rejected this claim stating, "By the trial's end, however, the prosecution had managed to blow so many holes in Robinson's alibi that the only effect their testimony would have had would be to have transformed Robinson's alibi from an incredibly tall tale to just a tall one." *Robinson*, 2 F.3d at 571.

[10] In *Rice*, in rejecting a preindictment delay claim, we observed, concerning the defendant's claim (pretrial) that the delay had allowed the government to procure evidence against him that at trial "[n]o such later acquired evidence was ever offered against any of the defendants." *Rice*, 550 F.2d at 1369.

case, but also from knowledge of what the defense is able to produce. It is settled that, to sustain a claim of substantial prejudice based on lost evidence or witnesses, the defendant must show that "the information. . .could not otherwise be obtained from other sources" *United States v. Beszborn*, 21 F.3d 62, 67 (5th Cir., *cert. denied*, ___ U.S. ___, 115 S.Ct. 330, 130 L.Ed.2d 288 (1994) (reversing pretrial dismissal based on due process claim of pre-indictment delay). *See also United States v. Royals*, 777 F.2d 1089, 1090 (5th Cir. 1985) ("[D]efendant has failed to show that such evidence could not have otherwise been obtained."). Where the due process claim of pre-indictment delay is ruled on pretrial, the defense, which frequently will be in a much better position to know of or unearth such "replacement" defensive evidence, has every incentive *not* to diligently look for or come forward with it. At trial, however, the incentive is precisely the opposite. *Then*, if the evidence is not produced, we can have much more confidence that it could not have been.

There is no way to know this case will be a *Townley*. At this stage, any claim that Crouch and Frye will be convicted because of substantial prejudice from pre-indictment delay is purely speculative. For example, Crouch claims that the delay deprived him of the testimony of his father, who died in June 1992, the indictment having been returned in November 1992, and of Tranquillo Gubert, who died in September 1988, both former directors of Delta Savings Association. But Crouch does not claim that either of these individuals knew anything of the charged transactions, only that they would have testified that Gerjes, Delta's president, was in charge of Delta and often misled the board and Crouch. Such testimony is of only attenuated relevance to the charged transactions, and there is no showing that other board members were not available to supply this

evidence.[11] As to Larry Tschearner, an officer of another involved entity, who died at an unspecified time before the return of the indictment, the claim that he could have impeached expected government witnesses Gerjes and Ferguson is plainly a speculative basis on which to find prejudice pretrial.

Frye's claim respecting the lost "Profit Participation Agreement" is deficient because there is no showing that it contained helpful, material evidence not reflected in the "Memorandum" thereof, which likewise tends to show Frye's intent to work with Ferguson in developing the land. As to the original waiver of notice form, Frye claims that the original is necessary to prove there was no forgery. But his presupposes the government will produce evidence that there was a forgery. This relates to count 18 of the indictment, which alleged false statements to Delta in connection with a loan application, contrary to 18 U.S.C. §§ 1014 and 2.[12] It is

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[11] Furthermore, a defendant claiming pre-indictment delay must show that any claimed prejudice is attributable to that portion of the delay that is *undue*. *CF. Walters v. Scott*, 21 F.3d 683, 688-89 (5th Cir. 1994) (evidence lost before delay became excessive is not lost due to excessive delay). Here, there is no basis for finding that, at the time of Gubert's death in 1988, the pre-indictment delay had become undue delay.

[12] The presently relevant part of count 18 is as follows:

> "C. The said false and fraudulent statements were contained in the purported application for the loan in the name of defendant MICHAEL J. FRYE's corporation, J.M.G. Financial Corporation, and accompanying purported minutes of a meeting of the directors of the defendant's corporation authorizing the defendant to purchase DELTA REO on behalf of the

apparent that a conviction on count 18 can be obtained without reference to whether a directors' meeting was actually held, and, further, that whether or not the minutes were forged does not establish whether or not a directors' meeting was held.[13]

> corporation, and were intended by the defendant to be included in the loan file of the sham, nominee loan in order to enable the making of the loan in connection with a 'cash for trash' transaction, to avoid loans to one borrower limitations and to avoid detection by DELTA officials and regulatory examiners of the nature of the nominee loan.
>
> D. The application and corporate minutes were materially false in that they purported to represent the intent of defendant MICHAEL J. FRYE that he and his corporation be held liable for repayment of the debt, when the defendants then and there well knew that defendant MICHAEL J. FRYE was a mere nominee borrower who

believe himself and his company to have no actual liability on the note. Additionally, the corporate minutes were false in that no such directors' meeting actually was held.

[13] Moreover, there was no evidence that any expert had tried and been unable to perform a handwriting analysis on the copy. There was only the testimony of a nonexpert FBI special agent that "there may be some handwriting analysis people that will work with copies, but our people in our laboratory prefer originals." When asked if they would work with copies, he said "I don't know. I doubt it, but I don't Know for sure. I don't think they would."

In my view, there is simply insufficient evidence to establish with the requisite degree of certainty that if trial is held Crouch and Frye will be convicted and in that connection will have suffered substantial, actual prejudice from any undue delay.

I respectfully dissent. Moreover, it appears to me that this case should be taken *en banc*.

APPENDIX C

UNITED STATES of America,

v.

A Guy CROUCH, III, and
Michael J. Frye

Cr. No. G-92-22

United States District Court,
S.D. Texas,
Galveston Division.

Oct. 18, 1993.

Bank fraud defendants moved to dismiss indictment on basis of undue preindictment delay. The District Court, Kent, J., held that indictment returned eight years after alleged transactions occurred and six and one-half years after the criminal referrals issued resulted in actual and presumptive prejudice which was not rebutted by the government.

Motions granted.

1. United States Magistrates — 26

Although magistrate judge confined himself to the record established at evidentiary hearing and did not consider exhibits attached to dismissal motions themselves when recommending that indictments against defendants be dismissed for undue preindictment delay, district court would consider those exhibits to be part of the relevant pleadings and would specifically rely upon them when appropriate.

2. United States Magistrates — 27

Except in extreme circumstances, evidence offered at evidentiary hearing before magistrate judge will be the evidence that district court till give de novo review; any other approach would encourage counsel to hope for victory before magistrate judge while protecting otherwise relevant evidence for use on appeal in event of an adverse recommendation.

3. United States Magistrates — 27

Having been duly cautioned by written order of district court that, should government elect to forgo any meaningful participation at evidentiary hearing before magistrate judge, it would find little solace before district court should it seek to introduce such evidence in a de novo appeal from an adverse ruling, government's attempt to offer any new evidence through its objections, which it failed to present at evidentiary hearing, would be ignored when reviewing magistrate judge's recommendation that indictments against defendants be dismissed on basis of undue preindictment delay.

4. Courts — 90(2)

In Fifth Circuit, a panel decision, right or wrong, may not be overruled by another panel, not to mention a district judge, in the absence of en banc consideration or superseding decision of the United States Supreme Court.

5. Courts — 96((5)

District court is not obligated to follow decision from sister circuit.

6. Constitutional Law — 257.5

Due process protection of Fifth Amendment is restraint on improper governmental action, including prosecution. U.S.C.A. Const.Amend. 5.

7. Constitutional Law — 265

Fifth Amendment protects accused from overly stale charges; it does not insulate government from results of its negligence. U.S.C.A. Const.Amend. 5.

8. Constitutional Law — 251.

Purpose of Fifth Amendment is to limit power of legislature as well as that of prosecuting officers of the United States. U.S.C.A. Const.Amend. 5.

9. Indictment and Information — 7, 144.-1(1)

Bank fraud indictment returned eight years after alleged illegal banking transactions occurred and six and one-half years after criminal referrals issued resulted in actual and presumptive prejudice which was not rebutted by the government and therefore, defendants were entitled to dismissal of indictment.

10. Indictment and Information — 144.2

Government's argument in mitigation of prejudice suffered by defendants due to eight-year preaccusation delay, namely that passage of time did not diminish vitality of documents and that it was within four corners of documents that inference of wrongdoing lied, was without merit; under government's "documents speak for themselves" approach, only burden of proof on government to gain bank fraud conviction would be authentication of documents and there

was more to a criminal trial than this, such as meaningful impeachment of accusatory witnesses and criminal intent, and any evidence that would assist defendants in these areas was precisely the "exculpatory evidence" that government argued could not exist in a "document driven" case.

11. Constitutional Law —265
Indictment and Information — 7

When prejudice visited upon defendants by virtue of lengthy preindictment delay is substantial, lack of sufficient number of processing personnel or prosecutorial overload is, at best, entitled to only slight weight in the balance of the process considerations. U.S.C.A. Const.Amends. 5, 14.

Jimmy Phillips, Angleton, TX, Steven Jay Rozan, Houston, TX, for A. Guy Crouch, III.

Guy Womack, U.S. Attys. Office, Houston, TX, for U.S.

OPINION AND ORDER

KENT, District Judge.

Before this Court is the Report of the Magistrate Judge recommending that the motions of Defendants, Crouch and Frye to dismiss the instant indictment on the basis of undue pre-indictment delay be granted. The Court submits this Opinion and Order, and for the reasons herein stated, the motions are **GRANTED**.

There is no significant dispute about the factual history of this litigation and a general rendition of those facts

will suffice for the purpose of this Opinion and Order. In 1984 and 1985, prior to the closure of the Delta Savings Association, Defendants Crouch, Frye, and Shawell were involved in alleged illegal banking transactions now made the basis of this prosecution. Subsequent to the failure of Delta, federal examiners of the Federal Home Loan Board conducted an extensive examination of the bank's records. This investigation resulted in the issuance of a formal referral dated March 10, 1986, recommending a criminal investigation be conducted into the involvement of several individuals in questionable real estate transactions at Delta. The named individuals included, among others, Robert Ferguson, Carl Gerjes, and the three Defendants named in the instant indictment. (Motion of Defendant Crouch, Exhibit "C")

The prosecution of Gerjes was given top priority and culminated in his conviction in 1989. Gerjes was prosecuted again in 1992 and on April 22, 1992 pleaded guilty before this Court and agreed to cooperate with the government in this prosecution. Ferguson was convicted on January 31, 1992; he too pleaded guilty here and agreed to help the government in the prosecution of this indictment.

In March, 1992, the government turned its sights towards Crouch, Frye, and Shawell, and on November 12, 1992, eight years after the alleged transactions and six and one-half years after the criminal referrals, the instant indictment was returned. There is no evidence that either Crouch or Frye had any notice they were targets of criminal investigations at any time prior to March, 1992.

Shawell entered a plea of guilty before this Court on May 28, 1993, and, along with Gerjes and Ferguson, has agreed to cooperate with the government against his co-defendants. Crouch and Frye, on the other hand, have steadfastly professed their innocence and each has challenged

the indictment as violative of the Fifth Amendment due process clause as a result of the lengthy pre-indictment delay.

The United States Magistrate Judge conducted an evidentiary hearing on the Defendants' motions to dismiss for undue prosecutorial delay and thereafter recommended that the motions be granted and the indictment dismissed. The government promptly filed objections to the Report and Recommendation and Frye has filed a response urging this Court to adopt the recommendation of the Magistrate Judge.

[1] This Court, having reviewed the relevant pleadings and their attachments,[1] read the transcript of the evidentiary hearing, and given the matter *de novo* review, concludes that the Magistrate Judge reached the proper result and his Report and Recommendation, except as hereinafter modified and supplement, is **ADOPTED**.

[2,3] The Court notes, in passing, that the government sought to avoid the evidentiary hearing in the first instance, arguing it was unnecessary; history has now borne out the impropriety of that position. Interestingly, in an Order dated June 21, 1993, denying the government's appeal from the order of the Magistrate Judge scheduling the evidentiary hearing, this Court cautioned the government that anything but complete participation in evidentiary hearing before the

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[1] The Magistrate Judge apparently confined himself to the record established at the evidentiary hearing and did not consider the exhibits attached to the motions themselves (tr. pg. 50). This Court, on the other hand, considers those exhibits to be part of the relevant pleadings and will specifically rely upon them when appropriate to the disposition of this motion.

Magistrate Judge would not be a wise course to steer.[2] Given the magnitude of its docket, this Court relies heavily on the Magistrate Judge to handle pretrial matters, including evidentiary hearings in felony cases, and it cannot tolerate or condone a conditional approach by trial counsel. Except in extreme circumstances, the evidence offered at an evidentiary hearing before the Magistrate Judge will be evidence this Court will give *de novo* review; any other approach would simply encourage counsel to hope for victory before the Magistrate Judge while protecting otherwise relevant evidence for use on appeal in the event of an adverse recommendation. Accordingly, having been duly cautioned by written order of this Court, the government's attempt to offer any new evidence through its objections, which it failed to present at the evidentiary hearing, will be ignored.

[4,5] The pivotal issue in this case concerns the proper standard to be applied. The government argues that the Magistrate Judge erred in rejecting the reasoning of *United States v. Lovasco*,[3] 431 U.S. 783, 97 S.Ct. 2044, 52

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[2] The Order reads, in pertinent part, as follows: ". . .if the Defendants' evidence convinces the Magistrate Judge that the length of delay prior to the return of this indictment is inexcusable
and sufficiently prejudicial, any decision by the government to forego the presentation of evidence of justification will be made at its peril. Should the government elect to forego any meaningful participation at the evidentiary hearing before the Magistrate Judge, it will find little solace before this Court should it seek to introduce such evidence in a *de novo* appeal from an adverse ruling.

[3] *Lovasco*, the government argues, stands for the proposition that despite
prejudice to an accused, a lengthy pre-indictment delay will

L.Ed.2d 752 (1977), in favor of *United States v. Townley*,[4] 665 F.2d 579 (5th Cir.), *cert. denied, Townley v. United States*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982), but given the circumstances of this case, the Magistrate Judge was, in this Court's opinion, correct. The government urged that the *Townley* decision is an "anomaly case which is not the most proper state of the law," (page 48), however, as the Magistrate Judge pointed out, *Townley* is still viable Circuit authority and it post-dates and distinguishes the *Lovasco* approach. 665 F.2d at 582. More importantly, in this Circuit, a panel decision, right or wrong, may not be overruled by another panel, not to mention a District Judge, in the absence of *en banc* consideration or superseding decision of the United States Supreme Court. *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, *reh'g en banc denied*, 936 F.2d 571 (5th Cir. 1991); *see also Burlington Norther R.r. Co. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir. 1992), *cert. denied*, ___ U.s. ___, 113 S.Ct. 1028, 122 L.Ed.2d 173 (1993). Nor is this Court, as the government suggests, obligated to follow a

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not violate due process unless the accused can show that the government's delay was intentional and motivated by the government's bad faith desire to gain a tactical advantage over the accused. While this Court does not read *Lovasco* so narrowly, further discussion on this issue is unnecessary.

[4] *Townley* holds that in the appropriate case the "due process issue relative to the deprivation of a fair trial by lengthy delay . . . turns upon whether the degree of prejudice thereby sustained by the accused is sufficiently balanced by the good faith reasons advanced by the government." 665 F.2d at 582.

decision from a sister circuit.[5] The reasoning of *Townley* is most appropriate in this case.

[6,7] Undaunted the government then proposed the precise theory flatly rejected by the Fifth Circuit in *United States v. Brand*, 556 F.2d 1312, 1317 n. 7 (5th Cir. 1977), *cert. denied, Brand v. United States*, 434 U.S. 1063, 98 S.Ct. 1237, 55 L.Ed.2d 763 (1978), and thereafter in *Townley*, that "governmental interests not amounting to an intentional delay will automatically justify prejudice to a defendant." *Id.* 665 F.2d at 582. In this Court's opinion, this is not, and should not be, the law. The due process protection of the Fifth Amendment was enacted, as part of the Bill of Rights, to protect citizens from the power of the federal government; it is a restraint on improper governmental action, including prosecution. *Ex parte Wilson*, 114 U.s. 417, 5 S.Ct. 935, 29 L.Ed. 89 (1885). If the due process issue relative to the deprivation of a fair trial because of lengthy pre-indictment delay were to turn upon the need of the accused to show governmental malice, the protections of the Fifth Amendment would be seriously curtailed; especially where, as here, the government successfully resists discovery of the information from investigative files which could confirm or defeat its allegations of good faith and then, despite judicial monition, chooses to rely on only general conclusory evidence to justify an eight-year pre-indictment delay. The Fifth Amendment

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[5] The government urges the Court to reject *Townley* i favor of a more recent decision of the Seventh Circuit, *United States v. Anagnostou*, 974 F.2d 339 (7th Cir. 1992) *cert denied*, ___ U.s. ___, 113 S.Ct. 1943, 123 L.Ed.2d 649 (1993), but this Court notes that the Seventh Circuit while following fifth Circuit authority in the past has clearly recognized its freedom not to do so, *Richards v. Local 134, Int'l Bhd. of Elec. Workers*, 790 F.2d 633 (7th Cir. 1986); this Court is no less free.

protects an accused from overly stale charges, it does not insulate the government from the results of its negligence. To apply the *Lovasco* reasoning to the case at bar, on the present record, would be unfair and, in the last analysis, fairness is what due process is all about. *United States v. Shaw*, 555 F.2d 1295, 1299 (5th Cir. 1977) (The due process inquiry turns on "whether the prosecution's actions violated 'fundamental conceptions of justice' or the community's sense of fair play and decency.")

[8] The government's argument that the statute of limitations should control is also unpersuasive. Even *Lovasco* recognizes that while the statute of limitations provides the primary guarantee against the prosecution of overly stale charges, it does not fully define the defendant's rights with respect to the events occurring prior to the return of the indictment; the due process clause of the Fifth Amendment also has a role to play in protecting against oppressive delay. *See United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Certainly the enactment of 18 U.S.C. § 3293, which extended the applicable statute of limitations from five to ten years, did not abolish the Due Process Clause of the Fifth Amendment. Indeed, when the two are at odds the statute must succumb to the Amendment. The purpose of the Fifth Amendment is to limit the power of the legislature as well as that of prosecuting officers of the United Sates. *Ex parte Wilson*, 114 U.S. 417, 5 S.Ct. 935, 29 L.Ed. 89 (1885).

[9] The government complains that the doctrine of "presumptive prejudice" articulated most recently by the Supreme Court in *Dogett v. United States*, ___ U.S. ___, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), is inapplicable to a Fifth Amendment due process claim, but this position seems indefensible. Prejudice is prejudice; it may take many forms, but it does not change in substance. If post-accusation delay of eight and one-half years results in a presumption of

prejudice in favor of Mr. Doggett, it is difficult to imagine why the eight year *pre*-accusation delay in this case wouldn't come to the aid of Defendants Crouch and Frye. Of the numerous forms of prejudice caused by delay, the most serious is the **possibility** an accused's defense will be impaired by dimming memories and loss of exculpatory evidence. *Doggett*, ___ U.S. at ___, 112 S.Ct. at 2692, 120 L.Ed.2d at 530. As in *Doggett*, these Defendants claim this kind of prejudice, and there is probably no more meaningful kind that they can claim since neither was aware, until shortly prior to the return of the indictment, that criminal charges would be brought against him. It is noteworthy that the Supreme Court discussed the role of governmental bad faith in *Doggett* and found that while negligence is to be weighed more lightly than a deliberate attempt to harm the defense, "it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution" and its toleration will vary inversely with the protractedness and consequent thereat to the fairness of an accused's trial. *Id.* ___ U.S. at ___, 112 S.Ct. at 2693, 120 L.Ed.2d at 531-2. Memories do not dim over time any less for the purpose of the Fifth Amendment than for the purpose of the Sixth. Indeed a better argument can be made that the presumption should be even stronger in regard to pre-indictment delay. Once an accused is charged with an offense, he will, presumably, seek counsel, begin to prepare a defense, preserve important evidence, interview significant witnesses, and make an effort to memorialize exculpatory evidence. When one is unaware of the possibility of being accused, he has absolutely no motivation to take these precautionary measures. The government's comment that Crouch's failure to take precautionary measures is "of no moment" is naive. It may be of no moment to the government, but it is a fundamental reason for the very existence of the presumption. This Court agrees with the Magistrate Judge that the applicability of the doctrine of presumptive prejudice to the instant case cannot be ignored.

It is uncontroverted that Defendant Crouch actually failed to make prepar-ations to defend himself against the present accusations because until 1992 he was assured he was *not* a target of any criminal investigation. Three different government officials left Crouch with the impression he was not the subject of a criminal investigation. Mr. Mimms, the FHLB examiner who made the referral only eight months after demanding Crouch's resignation in November, 1985, refused to tell Crouch he had done anything wrong. (pg. 107) In 1989, United States Attorney DeGabrielle, in discussion about Crouch's possible testimony against Gerjes assured Crouch he was not the subject of a criminal investigation (pg. 64-5) and Agent Kettler, on several occasions, and at least once in the presence of Carolyn Hines (pg. 158-9), do so as well. (pg. 65) The government meets this testimony with the proposition that Crouch was not a target at the times he asked about his status because it was not until after Ferguson's debriefing that the government fist learned of Crouch's involvement. This proposition is incredible. First, despite the government's contention to the contrary, there is nothing in the record to demonstrate that it was only after Ferguson implicated Crouch in January of 1992, the he became a "technical" target; this "evidence" is contained in the government's objections and it is not before the Court. (See discussion at p. 3-4) Furthermore, the March 10, 1986 criminal referral form (Defendants' Exhibit 1), Mimm's report of March 18, 1986 (Defendants' Exhibit 3), and Mimm's letter of July 31, 1986 (Defendants' Exhibit 2) contain references to the involvement of Crouch and Frye in the very transactions made the basis of this indictment, as well as other allegations of "Potential violations of the loans-to-one-borrower-limitations, the probability of nominee borrowers, excessive attorney's fees due Mr. Crouch, deceptive loan practices, management actions which are increasing the risks of problem assets, and 'cooking the books' to show profits on the disposal of problem assets" (Defendants' Exhibit 3, page 2). Despite the availability of

this information as early as March of 1986, the government allowed years to pass before focusing on these Defendants; years in which they could have been mustering a defense against this belated indictment. While this may not constitute bad faith to gain a tactical advantage,[6] it certainly smacks of negligence sufficient, over an eight and one-half year period of time, to constitute substantial presumptive prejudice to these Defendants. This Court will never be able to observe the defense Crouch and Frye could have mustered before the lapse of time since the criminal referral.

The Defendants have, despite the passage of time, also shown that the actual events which have occurred have resulted in some actual prejudice to supplement their reliance on the presump-tion; unfortunately, the passage of time frustrates the ability of this Court to accurately quantify the actual prejudice suffered. Without doubt, several other-wise potential defense witnesses are now actually dead and, despite the govern-ment's exhortation that none of them possessed relevant evidence not still obtainable from living persons, this Court can never know what the importance of their testimony would be. Crouch testified that his Father, Mr. Gubert and Mr. Tschearner could all testify about how Mr.

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[6] The Court is not making this finding now. Further inquiry might have revealed this to be the tip of the "bad faith" iceberg, but the Magistrate Judge granted the government's motion to quash the subpoenas for information in the investigative files of the United States Attorney and the Federal Bureau of Investigation where further evidence of bad faith might be located. In this Court's opinion, the record in its present form, will not justify a finding of bad faith, but because of the limitations imposed by virtue of the rulings of the Magistrate Judge, it cannot be ruled out. This question may have to be addressed on another day.

Gerjes controlled matters at Delta Savings and how they relied on information from him and other inside officers. The government cries that none of this "irreplaceable" evidence would meet the testimony of Gerjes and Ferguson and as a result, in its opinion, there is no prejudice. This Court, however, is very troubled by the government's assertion. During cross-examination of Crouch, the government asked the following, revealing question: "Sir, if you were to hear the testimony of witnesses that you (Crouch) made all the major decisions at Delta Savings during 1985 and part of 1986 that you were there, would you be of the opinion that these people are lying when they said that?" (pg. 109). The obvious suggestion is that part of the government's case will include such testimony and, quite frankly, even though Crouch opined that such witnesses would simply be ill-informed, rather than lying, the testimony of the now-deceased and unaccused witnesses would be crucial to rebut the credibility of such testimony. This is especially so if such testimony comes from Gerjes[7] and/or Ferguson who are convicted cooperating witnesses eager to minimize their

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[7] Gerjes poses another problem. As Crouch testified, after the criminal referral from the FHLB, he specifically asked and received the assurance of Assistant United States Attorney DeGabrielle in 1989 that he was not targeted in the Delta investigation (pg. 64-5). He sought this assurance before he agreed to testify against Gerjes fearing Gerjes would be motivated to retaliate in the event the government turned its attention toward him; history has now afforded Gerjes that opportunity. although Crouch did not testify at Gerjes' trial, he did appear before Judge DeAnda willing to testify as the custodian of records for his law office. (pg. 87) The government's position that there is no connection with Gerjes' involvement in this case seems somewhat naive when considered in the realm of possible bias or motive of Gerjes' testimony against Crouch.

ultimate sentences through favorable prosecution testimony against the instant Defendants. Most important would be the lost testimony of Tschearner who Crouch claims could testify, *inter alia*, that "(t)he only people that were mentioned that Mr. Ferguson stated he dealt with at Delta Savings was Carl Gerjes and Andy Erskine." (pg. 61-2) Of course, the Defendants cannot state with specificity what these dead witnesses could actually have said, or how credible their testimony would have been, but they are **actually** irreplaceable and there is a distinct possibility that their testimony, which would obviously be relevant would have been favorable to the Defendants.

[10] In paragraph 13 of its objections, the government makes an interesting argument in mitigation of any prejudice suffered by the Defendants. The passage of time, it argues, does not diminish the vitality of the various documents involved in this case and it is within the four corners of the documents that the inference of wrongdoing lies. Would that it were so simple. Taking this "the documents speak for themselves" approach, the only burden of proof on the government to gain a bank fraud conviction would be authentication of documents. This Court believes there is more to a criminal trial. Credibility of accusatory witnesses must be subject to meaningful impeachment; documents must be viewed in light of preparatory discussions, and the government must still prove criminal intent. Any evidence that would assist the Defendants in these areas is precisely the "exculpatory evidence" the government argues cannot exist in a "document driven" case. The argument is without merit. This is not an instance, as the government argues, where the Defendants cannot overcome the inferences of wrongdoing apparent on the face of documents; it is an instance where the delay causes the presumption to interact with the actual events to establish the threshold inquiry of prejudice.

There are actual events that have occurred that have prejudiced these Defendants, unfortunately, the passage of time frustrates the ability of this Court to quantify the actual prejudice suffered. There are also actual document problems. Several potentially important documents are missing. For example, the original "Waiver of Notice of Special Meeting of Directors of JMG Financial Corp." (pg 82), which the government alleges to be an overt act of conspiracy. The government claims the copy of this document in its possession is a forgery, however, Agent Kettler testified that without the original, no handwriting analysis can be done by the FBI laboratory. The unavail-ability of the original for expert analy-sis therefore deprives the defense of this significant opportunity to rebut the testimony of Mr. Dunn that the signature purporting to be his is a forgery. (pg. 272-3) Also missing is the original as well as any copy, of the Profit Participation Agreement between JMG Corp. (Defendant Frye) and Ferguson C & D (government witness Robert Ferguson). Robert Johnson, the lawyer who prepared the agreement, together with a memorandum of the agreement for filing purposes could recall nothing about any conferences he might have had with Frye or Ferguson, but testified that from the memorandum it was obvious that the agreement was a "customized" agreement requiring client instructions. (pg. 129-31) This actual document, if available, might undercut the allegations of Frye as a nominee borrower. Other documents, although unidentified, are also gone. Frye purged his files at the time he relocated his office in September, 1990, four years after the criminal referrals. These files would have contained any workpapers concerning the transactions made the basis of this indictment. Ms. Gergen, Frye's employee, testified that Frye kept copious notes of every phone conversation he had (pg. 214), and, since the indictment had asked her about the possibility the files were still available (pg. 221). Crouch testified that he delivered personal records to the FBI (pg. 70-71) which pertained to these transactions and which, as a result, are no longer

available to him. Even Tommy Sears, an FDIC section chief at the records management center testified that the present whereabouts of original documents, including loan files and loan committee minutes, seized from Delta at its failure by the FSLIC is unknown (pg. 166). Despite the government's declaration that the Defendants have copies of all the government's trial exhibits, this Court can never know contents of the missing documents and their importance to the Defendants.

Having found prejudice, the Court must look to the government's efforts to rebut its effects; in the case at bar, those efforts fall short. The govern-ment's heretofore stated position that the Defendants should be satisfied with the documents the government intends to use against them at trial is untenable. The problem is with the documents that are missing or no longer exist; there are the document that the Defendants urge could well have been preserved and aided them in their defense. The government's position that Crouch was disingenuous in his assertion of memory loss and that there is not evidence of Frye's dimming memory is unpersuasive. Fourteen pages of expert testimony established that everyone including Frye, suffers memory loss over time. Moreover, the government's conclusion that Crouch was being selective and evasive in his recall is not obvious from the face of the record. Indeed, even as experienced and professional as is Agent Kettler, he too had difficulty remembering numerous salient details, due to the sheer passage of time. Finally, the government's assertion that the deceased witnesses had no relevant knowledge and no impeachment value, is defeated by the simply fact that this Court can never know.

The burden likewise fell upon the government to prove the lengthy pre-indictment delay was justifiable and reasonable, but its proof is unpersuasive. at the commencement of the hearing (pg. 45-49) after some

colloquy with counsel, the Magistrate Judge made it clear that he might opt to apply the *Townley* "balancing test" to this case rather than the *Lovasco* "bad faith" approach. This clearly put the government on notice that any and all delay, not just tactical delay, might be relevant. The government was therefore, cautioned, once again, to respect the seriousness of the Defendants' motion and to fully develop the record inn support of its justification of the pre-indictment delay. Nonetheless, the government took guarded approach, offering general excuses for delay which did not withstand cross-examination. Time and again, Agent Kettler, called by the government to explain the delay, was unable to recall important aspects of the investigation. He generally cited the J. R. McConnell fraud investigation, the Suzanne Renee Richardson kidnapping, the Dow Chemical espionage investigation, the Carl Gerjes prosecution and the First Great South West Bar-B-Que investigation, as significant investigations diverting his attention from the case at bar during the relevant period of time. On cross-examination, however, although he admitted receiving the criminal referral from the FHLB concerning Defendants Crouch and Frye in August of 1986 (pg. 253), he stated that "without looking into the files" (pg. 253) he couldn't testify to the date or approximate date he first worked on this case; the first time he talked to the FHLB referring agent; when he first started procuring documents; whether he received the FHLB interim examination of March 18, 1986 (pg. 257); what his first step was in this investigation (pg. 259); whether he was ever directed by the U.S. Attorney to speed up this investigation during the lengthy delay (pg. 260); or who received the Grand Jury subpoenas (pg. 261). Interestingly, the Magistrate Judge interrupted the testimony, voiced his concern about the agent's inability to respond to pointed questions by defense counsel, reminded the government that the *Townley* balancing test could be appli-cable, and asked the government if it would like a recess to permit the agent time to review his files in order to respond to the detailed and important

information sought by the Defendants. The government declined this invitation preferring to avoid "specifics" (pg. 264) about the delay. These "specifics", or lack thereof, became highly and properly relevant to the Magistrate Judge when he thereafter chose to apply the *Townley* approach to this case.

[11] Even if this Court were inclined to accept the intervening investigations as justification for Agent Kettler's inability to give sufficient attention to this investigation during the eight year lapse of time, it would be of "no moment." This claim is nothing more than a complaint that there were insufficient personnel available to investigate or properly prepare this case; as such, it is insignificant. When the prejudice visited upon the Defendants by virtue of a lengthy pre-indictment delay is substantial, as this Court finds it to be in this case, lack of a sufficient number of processing personnel is, at best, entitled to only slight weight in the balance of due process considerations. *Townley*, 665 F.2d at 586. The same would be said if the government were to claim prosecutorial overload. *Id.* at 586. This Court is not blind to the burdens placed on local FBI agents to investigate potential criminal activity in this district, nor is it unaware of the demands upon the United States Attorneys; indeed, this Court has great admiration for the job these entities perform given the budgetary constraints of the federal government, generally, and for Agent Kettler and counsel of record for the government in particular. This Court, however, can neither ignore the Due Process Clause of the Fifth Amendment, nor encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority, *Doggett*, ___ U.S. ___, 112 S.Ct. at 2693-94, 120 L.Ed.2d at 532, despite such realities or it admiration of the governmental personnel involved.

The government opines that the delay is built into bank fraud cases by the cunning of the perpetrators to conceal

and convolute what they have done, (government objection paragraph 13); under certain circumstances, not present here, this argument might have merit. Unfortunately, the government had notice of the potential criminal activity of these Defendants in the very transactions made the basis of this indictment in early 1986 when the criminal referral was made and only four month's after Crouch's removal as chairman of the board of Delta Savings. The subsequent eight year delay cannot be attributed to the ability and "cunning" of these Defendants to conceal any fraudulent nature of these transactions. The unjustifiable pre-indictment delay is no significant fault of the Defendants and its resultant prejudice, actual and presumptive, has not been rebutted by the government. These Defendants are entitled to relief.

It is, therefore, the **ORDER** of this Court that the motions of A. Guy Crouch, III, and Michael J. Frye to dismiss this indictment on the basis of undue prosecutorial delay is **GRANTED**; the indictment is **DISMISSED** with prejudice as to these defendants.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

UNITED STATES OF AMERICA

VS. CRIMINAL NO. 6-92-22

A. GUY CROUCH, III, and
MICHAEL J. FRYE

REPORT AND RECOMMENDATION

Before this Court, by referral from the District Court, are companion motions of Defendants A. Guy Crouch, III, and Michael J. Frye, to dismiss the instant indictment because of undue prosecutorial delay. This Court has carefully reviewed the motions and other relevant pleadings, read and re-read the transcript of the evidentiary hearing, studied the applicable, sometimes contradictory, case law and concluded that the motions should be granted.

This Court is confident that the government will file objections to this Report which will require the District Court to conduct a de novo determination of those portions to which such objections are raised, 28 U.S.C. § 636(b)(1)(c), consequently, since the full transcript will be reviewed by the District Court, a comprehensive rendition of the facts will not be made here; detailed factual references will be made only when necessary to support conclusions drawn by this Court.

Reduced to the basics relevant to the disposition of the present motions, the facts are as follows. After the failure of Delta Savings Association of Texas, federal bank examiners prepared referrals in March, 1986, recommending criminal investigations into possible banking violations of several individuals, including Crouch and Frye, which occurred in

1984 and 1985. It wasn't until the middle or end of 1991 that the investigation began to focus on Crouch and Frye and it wasn't until March, 1992, that the government notified the Defendants that they were the subject of criminal investigations.[1] The Defendants were ultimately indicted in November of 1992. By the time Crouch realized he was the target of the government's investigation, he had already met and freely cooperated with FBI agents, delivered the originals of pertinent documents without retaining copies and agreed to testify for the government against Carl Gerges.[2] Because of government assurances that he was not the target of a criminal investigation, Crouch made no effort to prepare to defend himself against the present accusations, hire counsel, preserve evidence, or retain documents. Although Frye wasn't assured he was not the target of any criminal investigation, he also suffers from the unavailability of his personal records of the transactions made the basis of the indictment and as a result of the routine document destruction, in 1990, when he relocated his business office. Both Defendants suffer from the normal losses in memory of themselves and others over the eight-year passage of time, as well as the lost testimony of several important witnesses who died before the Defendants had reason to believe they might be indicted. Accordingly, they argue, quite persuasively, that they have been prejudiced by the delay and that forcing them

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[1] But for an extension of the statute of limitations from five years to ten years with the passage of FIRREA in August, 1989, limitations would have barred this prosecution in 1990.

[2] Carl Gerges was the individual given top priority by the government. He was indicted and ultimately convicted by a jury in 1989. He was again charged in 1992 and entered a plea of guilty before the District Court agreeing to cooperate with the government in its prosecution of this indictment.

to defend themselves against these stale charges would be impermissibly unfair.

In evaluating an asserted due process violation based on pre-indictment delay, the Court must consider both the reasons for the delay and the prejudice to the accused. The accused must prove the threshold requirement of actual prejudice or the inquiry ends; however, once actual prejudice is shown, it becomes necessary to engage in a sensitive balancing of the government's need for investigative delay against the prejudice proved by the defendant. United States v. Brand, 556 F.2d 1312, 1317, n. 7 (5th Cir. 1977). This case-by-case inquiry is thus reduced to the basic fundamental concepts of justice, fair play and decency. Untied States v. Shaw, 555 F.2d 1295, 1299 (5th Cir. 1977). The question is not whether a guilty party might evade the consequences of his acts, it is whether it would be fair to excuse the government's deference and to force the accused to defend himself in light of the prejudice suffered by the delay. While good faith reasons advanced by the government may excuse a lengthy pre-indictment delay, reasons such as low priority assigned to an investigation, overload of other investigative or prosecutive responsibilities, and insufficient personnel, similar to the reasons offered in the case at bar, are entitled to only slight weight in the balance of due process considerations if the prejudice to the defendant is substantial. United States v. Townley, 665 F.2d 579 (5th Cir. 1982).

The prejudice suffered by Crouch and Frye is substantial. Significant fact witnesses have died since the time of the original criminal referral from the bank examiners in early 1986. These witnesses include Tranquillo Gubert, former chairman of the board and major stockholder of Delta; a. Guy Crouch, II, an original founder and major stockholder of delta; Larry Tschearner, the vice-president of Bankers Savings & Loan; and Joseph Levy, a director of Bankers Savings & Loan. These witnesses could have provided

important testimony about the workings of Delta Savings and of Carl Gerges and Robert Ferguson. Gerges and Ferguson, who were assigned a higher priority in this investigation than the present Defendants, have been charged and convicted, have both cooperated with the government by providing information and testimony against Crouch and Frye and are available as witnesses should this cause go to trial. Obviously, as cooperative witnesses whose sentences may well be favorably affected by their assistance and testimony in this prosecution, the credibility of Gerges and Ferguson will be an important issue at trial; therefore, the deaths of individuals who could have met the testimony or impeached the credibility without the Defendants' personal motivation of avoiding conviction is irreplaceable. Moreover, personal records of these Defendants are gone, as are significant business records. For example the original of a waiver of a notice of a special meeting of the board of directors of JMG Financial, alleged in the indictment as an overt act of Frye in furtherance of the conspiracy, which is claimed to contain a forged signature, but which the FBI cannot evaluate from the photocopy available, is missing. For further example, a customized profit participation agreement which would clearly define the participation of Frye in one of the transactions contained in the indictment is unavailable. While this Court must confess that Crouch and Frye cannot, for the most part, identify with specificity the actual harms they have suffered as a result of the eight-year lapse of time, as the Defendants point out, Doggett v. United States, ___ U.S. ___, 120 L.Ed.2d 520 (1992), albeit a case involving a Sixth Amendment claim, offers dispositive enlightenment. The most serious form of prejudice caused by excessive delay is the dimming of memories and the loss to exculpatory evidence because the resultant inability of a defendant to adequately prepare his case intolerably skews the fairness of the entire system. Doggett, 120 L.Ed.2d at 530, citing Barker v. Wingo, 407 U.S. 514 (1972). Specific impairment of one's defense is difficult and often impossible to prove because

time's erosion of exculpatory evidence and testimony can rarely be shown; accordingly, excessive and inexcusable delay will result in the presumption of prejudice, even though unspecified. Id., 532. The Defendants have, with the added assistance of the presumption attendant to the eight-year delay, proven the existence of substantial prejudice.

In passing, this Court must state that it finds little fault with the energy with which the current prosecutor handled this matter; indeed, the Court commends his diligence. This matter was not assigned to Mr. Womack until May of 1991. given the evidentiary complexity of the matter, the eighteen month delay until the return of this indictment is not particularly offensive. Unfortunately, Mr. Womack's assignment came too late. The previous five year delay together with the additional twelve months during which these Defendants were kept unaware of their status as potential indictees caused the substantial prejudice suffered to negate even the unusually cooperative efforts of Mr. Womack to offset the effects of the delay. See Townley, 665 F.2d at 586.

The government argues that the balancing test applied in Brand and subsequent cases espousing it, should be ignored by this Court in favor of the "bad faith" approach recognized by United States v. Marion, 404 U.S. 307 (1971) and United States v. Lovasco, 431 U.S. 783 (1977), and applied in this Circuit by United States v. Bellard, 779 F.2d 287 (5th Cir. 1986), and more recently in United States v. Carlock, 806 F.2d 535 (5th Cir. 1986), and United States v. Dickerson, 932 F.2d 1142 (5th Cir. 1991), but this the Court cannot do. the government contends that these cases stand for the proposition that unless it can be shown that the government intentionally delayed the indictment in order to gain tactical advantage over the Defendant any resultant prejudice is irrelevant. This very argument was addressed in Townley and flatly rejected. 665 F.2d at 582. Here, as there,

the Court cannot close its eyes to the prejudice suffered by the Defendants simply by a showing that the government was inexcusably negligent, but not bad-intentioned. Although there is uncontroverted evidence that Crouch was personally assured on numerous occasions that he was not under criminal investigation, this Court will not, and need not, decide the issue of bad faith. To ignore the balancing test and its clear application to the facts in this case would be, quite simply, unjust and unfair and violative of the Fifth Amendment due process rights of these Defendants.

It is, therefore, the **RECOMMENDATION** of this Court that the motions of Defendants A. Guy Crouch, III, and Michael J. Frye to dismiss the indictment against them for undue prosecutorial delay be **GRANTED** and that the indictment be **DISMISSED**.

The Clerk shall send copies of the Report and Recommendation to the parties who have ten (10) days from the receipt thereof to file written objections thereto, pursuant to General Order 80-5. Failure to file written objections within the prescribed time shall bar an aggrieved party from attacking the factual findings on appeal.

DONE at Galveston, Texas, this 13th day of August, 1993.

/s/ John R. Froeschner
JOHN R. FROESCHNER
UNITED STATES MAGISTRATE
JUDGE

Supreme Court, U.S.
FILED
DEC 2 1996
CLERK

(2) (2)

Nos. 96-315 and 96-319

In the Supreme Court of the United States

OCTOBER TERM, 1996

A. GUY CROUCH, III, PETITIONER

v.

UNITED STATES OF AMERICA

MICHAEL J. FRYE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners were entitled to pre-trial dismissal of the indictment because of preindictment delay.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-315

A. GUY CROUCH, III, PETITIONER

v.

UNITED STATES OF AMERICA

No. 96-319

MICHAEL J. FRYE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A70)[1] is reported at 84 F.3d 1497. The panel opinion of the court of appeals (Pet. App. B1-B27) is reported at 51 F.3d 480. The order of the district

[1] Unless otherwise indicated, all citations to the petition and petition appendix refer to No. 96-315.

court dismissing the indictment (Pet. App. C1-C20) is reported at 835 F. Supp. 938.

JURISDICTION

The judgment of the court of appeals en banc was entered on May 30, 1996. The petition for a writ of certiorari was filed on August 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Southern District of Texas, petitioner Crouch was indicted for conspiracy to commit bank fraud, in violation of 18 U.S.C. 371; bank fraud, in violation of 18 U.S.C. 1344; misapplication of bank funds, in violation of 18 U.S.C. 657 (seven counts); false entries, in violation of 18 U.S.C. 1006 (five counts), and false statements, in violation of 18 U.S.C. 1014 (five counts). On five of the 19 counts, petitioner Frye was also indicted. The district court dismissed the indictment for unlawful preindictment delay. Pet. App. C1-C20. The court of appeals affirmed the dismissal. *Id.* at B1-B27. The en banc court of appeals reversed. *Id.* at A1-A70.

1. Petitioner Crouch was the chairman of the board and a loan committee member of Delta Savings Association (Delta), a federally insured savings and loan association in Alvin, Texas, from January 1985 until his resignation in September 1996. He was also Delta's attorney, as well as the half-owner, with his father, of a title company that closed Delta loans. Pet. App. A7. Petitioner Frye was a real estate investor and developer. The indictment alleged that from December 1984 to August 1985, Crouch and Robert Ferguson, a real estate broker and investor, developed a scheme to rid Delta's records of various tracts of land that Delta had acquired through foreclosure. As

part of the scheme, Ferguson was required to provide persons willing to pretend to be bona fide buyers of the property and to sign loan contracts to purchase the real estate. Ferguson induced petitioner Frye and Kerry Shawell to act as sham buyers of the property on behalf of Ferguson for the purpose of avoiding limitations on loans to one borrower. *Id.* at A10-A12.

Delta failed shortly afterwards. In March 1986, federal regulators discovered petitioners' scheme while examining Delta's records. Criminal referrals issued for Carl Gerjes (Delta's president), Ferguson, and petitioners. The government initially focused its investigation on Gerjes and Ferguson, which led to Gerjes' conviction in 1989 and his guilty plea to separate but related offenses in 1992, and to Ferguson's conviction in 1992. As a result of the shortage of personnel at the local FBI office, the investigation of petitioners' case was delayed. Pet. App. A16-A17. Meanwhile, in response to the savings and loan scandal of the 1980s, in 1989 Congress extended the statute of limitations for financial institution offenses to ten years. See 18 U.S.C. 3293. Without that amendment, the statute of limitations for petitioners' crimes would have expired in 1990. Pet. App. A16; *id.* at D2.

In 1990, following Gerjes' first conviction and the addition of more agents to the local FBI office, the government focused its attention on petitioners' case. The instant indictment issued on November 12, 1992. Pet. App. A17-A18, B3.

2. Petitioners moved to dismiss the indictment for undue preindictment delay, in violation of the Due Process Clause. The district court granted the motion and dismissed the indictment. The district court concluded that the delay in prosecuting petitioners

was "presumptively prejudicial." It noted that several defense witnesses had died in the interim, and that several potentially important documents were missing. Pet. App. C10-C16. The district court also held that the government's explanation for the delay—the low priority assigned to petitioners' case and a manpower shortage—showed that it had been negligent in prosecuting petitioners. The court stated that the record did not support a finding that the delay was caused by bad faith, but stated that "bad faith" could not be ruled out. *Id.* at C13.

3. On the government's appeal, a panel of the court of appeals affirmed by a divided vote. The panel ruled that in preindictment delay cases, the defendant must show that he was actually prejudiced by the delay. If he meets that test, it is necessary to engage in a balancing of the government's reason for delay against the prejudice shown to the defendant. Applying that standard, the panel concluded that petitioners had shown actual prejudice from the deaths of several witnesses and the loss of certain bank documents. It also held that the reason for the government delay did not outweigh the prejudice to petitioners. Pet. App. B1-B27.

The en banc court of appeals reversed and ordered reinstatement of the indictment. The court ruled first that where an indictment is returned within the statute of limitations, preindictment delay does not violate due process unless, in addition to causing the defendant actual prejudice, the defendant shows that the delay was intentionally brought about by the government to obtain some tactical advantage over the defendant or for some other bad faith purpose. The court rejected petitioner's argument that prejudice can be presumed from the length of the delay

and that the reasons for the delay must be balanced against the prejudice to the defendant. Pet. App. A65.

Next, the court ruled that the actual prejudice requirement refers to prejudice at trial. Accordingly, a showing of possible or potential trial prejudice is insufficient. For that reason, a district court should ordinarily defer ruling on a pretrial motion to dismiss the indictment for preindictment delay until after the verdict, when the assessment of prejudice can more accurately be made. Pet. App. A66.

Applying those standards, the court ruled that petitioners did not meet either the bad faith or the actual prejudice requirements. The court concluded that the reasons for the delay—the lack of manpower and the low priority assigned to the case—did not constitute an effort by the government to gain a tactical advantage over the defendant or for some other bad faith purpose. Pet. App. A20-A43.

The court also held that petitioners failed to demonstrate actual prejudice. The court rejected Crouch's claim that he was prejudiced by the deaths of six potential defense witnesses. The court observed that two witnesses died in 1987 or 1988, before any delay that was even arguably undue, and that the six witnesses would not have provided information favorable to Crouch. The court ruled that Crouch's admission that he could not identify any lost documentation demonstrated that no favorable documents were lost as a result of the delay. Pet. App. A52-A57. The court went on to reject Frye's claim that favorable documents were lost during the period of delay, and explained that he had made only a speculative claim of prejudice in most instances. The court acknowledged that one of the allegedly lost documents might be material to an allegation in a false statement count

(Count 18) against Frye, but stated that prejudice to Frye could be obviated by striking that allegation from that count. *Id.* at A57-A64.

Two judges dissented on the ground that the district court's finding of actual prejudice was not clearly erroneous, and that the government's reasons for the delay were not justified. Pet. App. A66-A70.

ARGUMENT

Petitioners contend (96-315 Pet. 6-21; 96-319 Pet. 6-7) that the Due Process Clause of the Fifth Amendment requires dismissal of the indictment against them because of prejudicial preindictment delay. There is a conflict in the circuits on the standard for determining claims of preindictment delay, but that conflict is not directly presented on the facts of this case. Under either of the competing legal standards applied in the courts of appeals, petitioners would not be entitled to relief. Accordingly, further review is unwarranted.

1. The principal protection against preindictment delay is afforded by the applicable statute of limitations. Nevertheless, the Due Process Clause "has a limited role to play in protecting against oppressive delay" in the filing of an indictment. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 789 (1977). That limited protection, the Court ruled in *Lovasco* (*id.* at 789-790), is available only when the defendant has sustained actual prejudice from the delay, and the government's reasons for the delay are not adequate to justify going forward with a trial, in light of "fundamental conceptions of justice." *Id.* at 790-791 (citations and internal quotation marks omitted). The Court held that, while delay would not be justified where the government sought "to gain tactical advan-

tage over the accused," *id.* at 795 (quoting *United States* v. *Marion*, 404 U.S. 307, 324 (1971)), investigative delay does not deprive a defendant of due process, *ibid.* Investigative delay remains justifiable even when sufficient evidence exists to seek an indictment and even when the continued investigation focuses not on the defendant himself but on other participants in related criminal activity. See *Lovasco*, 431 U.S. at 791-796. Such "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" *Id.* at 795.

The lower courts have adopted different approaches in applying the *Lovasco* standard. As did the court below (Pet. App. A65), most courts of appeals have correctly ruled that relief is available only if the defendant is actually prejudiced and the government intended to delay the indictment in order to obtain a tactical advantage over the defendant or for some other bad faith purpose. See *e.g.*, *United States* v. *Hayes*, 40 F.3d 362, 365 (11th Cir. 1994), cert. denied, 116 S. Ct. 62 (1995); *United States* v. *Stierwalt*, 16 F.3d 282, 285 (8th Cir. 1994);[2] *United States* v. *Engstrom*, 965 F.2d 836, 839 (10th Cir. 1992); *United States* v. *Brown*, 959 F.2d 63, 66 (6th Cir. 1992); *United States* v. *Ismaili*, 828 F.2d 153, 167 (3d Cir.

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[2] In an earlier case, which petitioner Crouch cites (Pet. 7), the Eighth Circuit appeared to endorse a balancing test weighing the reasons for the delay against the actual prejudice to the defendant, once the defendant had demonstrated actual prejudice. *United States* v. *Savage*, 863 F.2d 595, 598 (1988). The Eighth Circuit does not appear to have recognized the intracircuit tension between its implicit acceptance of the majority approach in *Stierwalt* and its seeming endorsement of the minority view in *Savage*. In neither case, however, did the court dismiss the indictment, as the defendants had sought.

1987), cert. denied, 485 U.S. 935 (1988); *United States* v. *Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), cert. denied, 484 U.S. 1035 (1988); *United States* v. *Crooks*, 766 F.2d 7, 11 (1st Cir.) (Breyer, J.), cert. denied, 474 U.S. 996 (1985). That reading of *Lovasco* is consistent with this Court's description of the due process violation in cases of preindictment delay as resting on actual prejudice and deliberate delay for the purpose of obtaining a tactical advantage. See *Arizona* v. *Youngblood*, 488 U.S. 51, 57 (1988); *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984); *Marion*, 404 U.S. at 324.

Three circuits apply a "balancing" test in assessing a due process challenge for preindictment delay. The Ninth Circuit has held that if the defendant shows prejudice, the court must then balance the length of the delay against the government's reasons for the delay. See, *e.g.*, *United States* v. *Bracy*, 67 F.3d 1421, 1427 (9th Cir. 1995); *United States* v. *Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986). The Seventh Circuit has held that once the defendant shows prejudice, the burden shifts to the government to explain the reasons for the delay and that the court balances the prejudice against those reasons. See, *e.g.*, *United States* v. *Canoy*, 38 F.3d 893, 902 (7th Cir. 1994); *United States* v. *Sowa*, 34 F.3d 447, 451 (7th Cir. 1994), cert. denied, 115 S. Ct. 915 (1995). The Fourth Circuit has held that if the defendant shows actual prejudice from the delay, the court must balance the defendant's prejudice against the government's justification for the delay to determine whether the delay violated fundamental conceptions of justice or the community's sense of fair play and decency. *Howell* v.

Barker, 904 F.2d 889, 895 (4th Cir.), cert. denied, 498 U.S. 1016 (1990).[3]

The conflict in the circuits on this issue is not directly presented in this case. The circuits that apply a balancing test require the defendant to make a showing of actual prejudice before the reasons for the delay are examined. See, *e.g.*, *Bracy*, 67 F.3d at 1427 n.3; *Canoy*, 38 F.3d at 902; *Sowa*, 34 F.3d at 451; *Howell*, 904 F.2d at 895. As these courts have uniformly held, the defendant must establish actual prejudice in the first instance before the court will weigh the length of the delay against the government's reasons for the delay. The en banc court of appeals made a thorough and detailed inquiry into the deaths of the potential witnesses and the claims of lost documents in this case, and concluded that neither petitioner had shown actual prejudice. Even if the court of appeals had followed the precedents of the Fourth, Seventh, and Ninth Circuits, it would have had no duty to undertake a balancing analysis in this case. Accordingly, because petitioners would derive no benefit from any other court of appeals' approach, the case does not present an appropriate vehicle for resolving the conflict among the circuits.

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[3] In *Jones* v. *Virginia*, 94 F.3d 900 (1996), the Fourth Circuit questioned whether a balancing test is the proper standard under *Lovasco*. The court noted that most of the courts of appeals do not use a balancing test, and that a balancing test appears to be inconsistent with this Court's formulation of the *Lovasco* standard in *Gouveia*, *Youngblood*, and *Marion*. The court recognized, however, that only the en banc court could overrule *Howell*. 94 F.3d at 904-905. The court ruled that under the *Howell* balancing test, the defendant was not entitled to relief. 94 F.3d at 909.

In addition, the reasons for the delay in this case do not establish a due process violation. The indictment was delayed because of a shortage of investigative agents and because the prosecutors assigned a low priority to this case. Those actions were taken in the context of the savings and loan crisis in the 1980s, during which bank fraud cases overwhelmed the federal criminal justice system. See Pet. App. A41. The government's delayed action did not constitute a design to obtain a tactical advantage over petitioner or some other "bad faith" reason.

Finally, the difference between the two-pronged rule adopted by most courts of appeals and the balancing test used in three circuits appears to be more theoretical than real. When the defendant fails to show that the government delayed the indictment to obtain a tactical advantage or for some other bad faith reason, see pp. 7-8, *supra*, or when the record affirmatively shows that the government did not delay the proceedings to obtain a tactical advantage over the accused, see, *e.g.*, *Bracy*, 67 F.3d at 1427 n.3; *Canoy*, 38 F.3d at 901-902; *United States* v. *Automated Medical Labs., Inc.*, 770 F.2d 399, 403-404 (4th Cir. 1985), the courts that apply the balancing test have to date uniformly denied relief. While the issue presented is important and might warrant this Court's review in an appropriate case, that review should await a case in which it becomes clear that the different tests would produce different outcomes.

2. Petitioners argue (96-315 Pet. 17-21; 96-319 Pet. 8) that because of the long delay in their case, they should be entitled to a presumption of prejudice instead of being required to show actual prejudice. That claim lacks merit. The Court has repeatedly stated that a defendant must show actual prejudice in

order to establish a due process violation for preindictment delay. See *Lovasco*, 431 U.S. at 789; *Marion*, 404 U.S. at 323; see also *Gouveia*, 467 U.S. at 192.

Petitioners' reliance (96-315 Pet. 20-21; 96-319 Pet. 8) on *Doggett* v. *United States*, 505 U.S. 647 (1992), is misplaced. In *Doggett*, the Court held that a lengthy post-indictment delay is presumptively prejudicial for purposes of establishing a Sixth Amendment speedy trial claim. *Id.* at 655. The test for determining whether a defendant has been afforded a speedy trial under the Sixth Amendment, however, is not applicable in judging preindictment delays under the Due Process Clause. *Marion*, 404 U.S. at 320-321. The courts of appeals have unanimously concluded that *Doggett* has not changed the rule that requires the defendant to show actual prejudice in cases of preindictment delay. See *Jones* v. *Virginia*, 94 F.3d at 906-907 (collecting cases); *United States* v. *Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996); *United States* v. *Bischel*, 61 F.3d 1429, 1436 (9th Cir. 1995).

3. There is no merit to petitioner Crouch's argument (Pet. 13-17) that the court of appeals erred by instructing district courts to wait until after trial to decide whether the defendant proved actual prejudice and whether he is entitled to dismissal of the indictment. The court below reasoned that, because actual prejudice is difficult to show in the abstract, a trial court should normally wait until after trial to determine whether the defendant has shown actual prejudice that warrants dismissal of the indictment. Pet. App. A50-A51. The court did not make that an inflexible requirement, because it specifically recognized that there will be cases in which it will be "clear[] and most indisputable" that the defendant suffered actual prejudice before trial that would

warrant pretrial dismissal of the indictment. *Id.* at A65. The court of appeals' holding is reasonable and consistent with this Court's observations on that issue. See *Marion*, 404 U.S. at 326 ("[e]vents of the trial may demonstrate actual prejudice").[4] In any event, because at this stage of the proceedings petitioners have not shown actual prejudice from the delay, dismissal of the indictment would not be warranted.

4. Petitioner Frye contends (96-319 Pet. 9-10) that the court of appeals erred in reversing the trial court's finding of actual prejudice. That fact-bound claim merits no review.

The district court made a finding of "actual and presumptive" prejudice (Pet. App. C20), but it also concluded that it could not quantify the "actual prejudice" suffered by petitioners (*id.* at C13, C16). In reversing the district court, the en banc court of appeals ruled that the district court erred in relying on presumptive prejudice and specifically held that the district court's findings of actual prejudice "are

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[4] Petitioners' reliance (Pet. 16) on *United States* v. *Foxman*, 87 F.3d 1220 (11th Cir. 1996), is misplaced. Although the Eleventh Circuit in that case did affirm a pre-trial finding of actual prejudice, *id.* at 1222-1223, it ultimately ruled that the trial court erred in dismissing the indictment without making findings as to the reason for the delay. *Id.* at 1224. *Foxman* further observed that pre-trial dismissal for preindictment delay would be a "rare" event that that court had never found appropriate. While the court of appeals remanded for further pre-trial proceedings, it cautioned that it could not affirm a pre-trial dismissal absent "detailed findings supported by a well-developed record." *Id.* at 1224 n.4. That dictum is consistent with the view of the Fifth Circuit here. See Pet. App. A48 (pre-trial motion should be granted only in "the very clearest and most compelling cases").

not supported by the record and are clearly erroneous." *Id.* at A64.

The court concluded that the district court's findings were clearly erroneous based on a thorough review of each item of evidence that petitioners claimed was lost or destroyed during the delay in filing the indictment. Pet. App. A52-A64. Petitioner Frye's assertion that the court of appeals misapplied the "clear error" standard constitutes nothing more than a factual disagreement with the court of appeals' ruling. That dispute does not warrant this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

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In The Supreme Court Of The United States

OCTOBER TERM 1996

A. GUY CROUCH, III, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

1. Respondent argues that "[t]he conflict in the circuits on this issue [of the bad-faith standard versus the balancing test] is not directly presented in this case" because the holding by the court of appeals overturning the prejudice findings means that Petitioner's claim would fail even under the balancing test. (Res. 9) No doubt the question of bad-faith versus balancing would be presented more starkly if the court of appeals had upheld the prejudice findings, as it should have done. However, the courts of appeals have done so only rarely. The Ninth Circuit reported recently that, because of the "heavy burden" on the defendant in proving prejudice, it could find only one case since *Lovasco* in which a federal court of appeals had upheld prejudice findings in a pre-indictment delay case. *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992) (*citing Howell v. Barker*, 904 F.2d 889 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990)).[1] This Court has waited twenty years since *Lovasco* for a case like this one, with a well-developed record, thoughtful and divergent opinions below, and en banc consideration by seventeen judges. This Court should wait no longer.

2. Respondent incorrectly characterizes the questions presented as containing the contention that Petitioner "should be entitled to a presumption of prejudice instead of being required to show actual prejudice." (Res. 10) Petitioner does not contend that presumed prejudice, standing alone, is sufficient. As the court of appeals noted, the magistrate judge and the district court each "combined the

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[1] The only court of appeals decisions to uphold prejudice findings since *Howell* are *United States v. Foxman*, 87 F.3d 1220, 1222-24 (11th Cir. 1996) and *United States v. Sowa*, 34 F.3d 447, 450-451 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 915 (1995).

presumed prejudice with the actual prejudice and then weighed the total against the government's reasons for delay." (Pet. A-43-44 n. 25) The court of appeals held that the district court erred in "partially relying on presumed prejudice." (Pet. A-65) Petitioner asks this Court to decide whether "presumed prejudice, ***combined with actual prejudice***, shifts the burden to the government to justify pre-indictment delay." (Pet. i) (emphasis added)

3. Respondent argues incorrectly that the difference between the balancing test and the bad-faith test is "more theoretical than real." (Res. 10) Respondent illustrates its point by asserting that, unless bad faith or improper motive is shown, even "the courts that apply the balancing test have to date uniformly denied relief." (Res. 10) None of the cases cited by Respondent supports its assertion, however, because, in each of the cases the court found insufficient prejudice, which made it unnecessary to reach the balancing prong. Respondent also overlooks *United States v. Barket*, 530 F.2d 189, 194-95 (8th Cir. 1976) (in absence of bad faith, government negligence rendered delay unreasonable).[2]

Furthermore, although outcomes matter, due process is about process, too. Under the balancing test, the burden shifts to the government to justify the delay. Under the bad-faith test, the defendant has the practically impossible task of proving the improper motivation of the government, a point explained in the most recent case relied on by Respondent. *United States v. Canoy*, 38 F.3d 893, 902 (7th Cir. 1994). The shifting of the burden to the government "is compelled by Supreme Court precedent and by simple logic because 'once the defendant has cleared the monumental hurdle of proving

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[2] *See also State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996) (bad faith not shown but no reasonable justification for delay).

prejudice,' he would have no way of establishing the reason for the delay unless the government was required to come forward with its explanation." *Id.* (internal citation omitted). Some courts have gone so far as to say that imposition of the bad-faith standard itself can constitute a denial of fundamental fairness. *Howell*, 904 F.2d at 894 (requirement "would violate fundamental conceptions of justice, as well as the community's sense of fair play"); *State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996) ("daunting, almost insurmountable, burden .... unconstitutional, unwarranted, and unfair").

In the present case, the only reason why the record includes evidence of the government's reasons for delay is that the magistrate judge made it clear that he might opt to apply the balancing test rather than the bad-faith test.[3] (Pet. C-18)

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[3] In the present case, government sought to avoid the evidentiary hearing by appealing the magistrate judge's scheduling order. The district court denied the appeal and "cautioned the government that anything but complete participation in [the] evidentiary hearing before the Magistrate Judge would not be a wise course to steer." (Pet. C-7) (footnote omitted) At the hearing on the motion to dismiss for pre-indictment delay, the magistrate judge

> clearly put the government on notice that any and all delay, not just tactical delay, might be relevant. The government was[,] therefore, cautioned, once again, to respect the seriousness of the Defendants' motion and to fully develop the record in support of its justification of the pre-indictment delay. Nonetheless, the government took [a] guarded approach, offering general excuses for delay which did not withstand cross-examination.

(Pet. C-18). When the F.B.I. agent in charge of the investigation showed an inability to remember crucial details, the Magistrate Judge

Without the balancing test, and the placing of the burden of proof on the government, no reasons for delay need be given by the government. Stonewalling would be constitutionally condoned.

4. Respondent incorrectly asserts that Petitioner has a "factual disagreement with the court of appeals' ruling" regarding the adequacy of the prejudice findings by the district court.[4] (Res. 13) The district court found that "[t]here is no significant dispute about the factual history of this litigation." (Pet. C-4) Neither the panel opinion nor the en banc opinion of the court of appeals disagreed with the district court's rendition of the facts. The controversy is over the methodology employed by the district court in reaching the conclusion that pre-indictment delay resulted in prejudice to Petitioner and the deference to be paid to the district court's conclusion.

> reminded the government that the [] balancing test could be applicable, and asked the government if it would like a recess to permit the agent time to review his files in order to respond to the detailed and important information sought by the Defendants. The government declined this invitation[,] preferring to avoid "specifics" [] about the delay.

(Pet. C-18-19).

[4] Respondent also assumes incorrectly that only Petitioner Frye and not Petitioner Crouch is contesting the court of appeals' holding regarding the adequacy of the trial court's actual prejudice findings. Petitioner Crouch's objection to the court of appeals' holding on that score is "fairly included" in his third question presented. Rule 14.1(a). To avoid any further mistake, Petitioner Crouch adopts Petitioner Frye's petition for a writ of certiorari, as Frye did Crouch's.

Respondent argued that the court of appeals "must subject this case to de novo review" because "the court's factual findings are premised on an incorrect view of the law." (Brief of Plaintiff-Appellee [sic]) 24) Petitioner argued that the district court's findings and conclusions should be upheld unless they were clearly erroneous. *United States v. Beszborn*, 21 F.3d 62, 66 (5th Cir.), *cert. denied, Westmoreland v. United States*, 115 S.Ct. 330 (1994). The panel of the court of appeals held that the district court's prejudice findings were not clearly erroneous. (Pet. B-10) The court of appeals en banc reviewed the concurrent findings by the two courts below,[5] and held the district court's prejudice findings to be clearly erroneous. (Pet. A-64) The en banc court of appeals couched its holding in the language of the "clearly erroneous" standard (Pet. A-64), but its "thorough review of each item of evidence" (Res. 13) revealed that it was undertaking *de novo* review. Respondent apparently now desires to abandon the *de novo* standard and to argue for deference to the findings and conclusions of the court of appeals.[6]

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[5] The en banc court of appeals noted the "two court" doctrine, under which this Court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (Pet. A-31 n. 10 (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 2771, 275-77 (1949)).

[6] Some courts have assumed that the issue of pre-indictment prejudice is a mixed question of law and fact, not subject to a presumption of correctness. *See, e.g., Stoner v. Graddick*, 751 F.2d 1535, 1544 n. 8 (11th Cir. 1985) (analogizing to Sixth Amendment ineffective assistance cases). The approach of the en banc court of appeals below resembles the one taken in *United States v. Bartlett*, 794 U.S. 1285, 1291 n. 7 (8th Cir.) (holding was not a determination that district court's findings were clearly erroneous but rather

Only the district court is in a position to exercise the necessary "delicate judgment based on the circumstances of each case." *United States v. Marion*, 404 U.S. 307, 324 (1971). Deference to the district court's findings is especially appropriate in a case like this one, in which the district court had to make credibility determinations about the testimony of witnesses regarding lost memory and the representations of the government regarding the conduct of the investigation. The district court accepted the fourteen pages of expert testimony about memory loss and rejected the government's argument that Petitioner had been disingenuous in his assertion of memory loss.[7] (Pet. C-17) The district court also found "incredible" the prosecutor's contention that the investigation had not begun until shortly before the indictment. (Pet. C-12) The en banc opinion of the court of appeals ignored those findings, instead of deferring to them. If any court should have deference paid to its findings, it should be the district court, not the court of appeals.[8]

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was a determination that they were based on an erroneous view of the law), *cert. denied*, 479 U.S. 934 (1986).

[7] The court of appeals completely ignored the testimony by the expert witness on memory loss, the testimony by petitioner about his loss of memory, the testimony by the investigating F.B.I. agent that revealed his loss of memory, and the trial court's findings regarding memory loss. (Pet. C-17-18)

[8] A proper exercise of deference to the findings of the district court is demonstrated in *United States v. Sowa*, 34 F.3d 447 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 915 (1995). There the district court accepted the defendant's testimony that he was prejudiced by loss of memory caused by his voluntary ingestion of alcohol and drugs. The court reasoned that, "While we are unsure that, upon *de novo* review, we would find such prejudice in the case of a defendant who deliberately destroys his own memory to his detriment, we

5. Respondent disparages the cert-worthiness of the question whether the district courts should wait until after trial to decide prejudice issues and to dismiss indictments for pre-indictment delay. However, Respondent apparently believed the question to be worthy when Respondent presented it in *Lovasco*, 431 U.S. at 788 n. 7, although in an untimely manner. Here the issue was raised by the dissenting judge at the panel level. (Pet. B-19-21) and was subjected to briefing, oral argument, and full treatment by the court of appeals en banc. Although appearing in the court of appeals' opinion as more of a "strong admonition" (Pet. A-70 n. 14) than an "inflexible requirement" (Res. 11), the question expressly reserved by this Court nearly twenty years ago finally is properly presented to this Court.

6. Respondent concedes that three federal circuits (Fourth, Seventh, and Ninth) employ some form of the balancing test.[9] The correct total is four. Citing *United States v. Stierwalt*, 16 F.3d 282, 285 (8th Cir. 1994), however, Respondent incorrectly lists the Eighth Circuit as a bad-faith jurisdiction. Actually, the Eighth Circuit began to employ a balancing test even before this Court's decision in *United States v. Lovasco*, 431 U.S. 783 (1977). *United States v. Jackson*, 504 F.2d 337, 339 (8th Cir. 1974) ("balancing the reasonableness of the delay against any resultant prejudice to the defendant"), *cert. denied*, 420 U.S. 964 (1975). After *Lovasco* the Eighth Circuit continued to invoke the balancing test. *United States v. Weaver*, 565 F.2d

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cannot say that the district court abused its discretion in reaching its conslusion in this case." *Id.* at 450.

[9] In conceding the Seventh Circuit, Respondent has changed its position from the one that both it and the court of appeals took below. (Supplemental Reply Brief of Plaintiff-Appellant 2-3; Pet. A-35).

129, 131 (8th Cir. 1977) (citing *Jackson, supra*), *cert. denied*, 434 U.S. 1074 (1978). The rule in the Eighth Circuit is that a panel is bound to follow the decision of an earlier panel, which becomes the law of the circuit. *United States v. Olness*, 9 F.3d 716, 717 (8th Cir. 1993) (only court en banc can overrule earlier panel decision and adopt differing rule of law), *cert. denied*, 510 U.S. 1205 (1994). As the court of appeals recognized in the present case, the *Stierwalt* decision has been ignored in later Eighth Circuit decisions. (Pet. A-36) (citing *United States v. Miller*, 20 F.3d 926, 931 (8th Cir.), *cert. denied*, 115 S.Ct. 226, (1994)). Cases like *Stierwalt* are abberations, which do not create any more of a genuine intracircuit conflict than do the few isolated balancing-test panel decisions in the Tenth and Eleventh Circuits. (Pet. 9 n. 3) The Eighth Circuit employs the balancing test, which makes a total of four circuits, not three as contended by Respondent. Every circuit has settled on a test. Nothing remains but for this Court to resolve the split in the circuits.

CONCLUSION

The petiton for a writ of certiorari should be granted.

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